No. 87-7023-CFX
Status: GRANTED

Title: Tyrone Victor Hardin, Petitoner
v.
Dennis Straub

Docketed:
March 16, 1988

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Hardin,Tyrone Victor

Counsel for respondent: Kelly,Frank J.

Entry	Date	Note	Proceedings and Orders
1	Mar 16 1988	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jun 30 1988		DISTRIBUTED. September 26, 1988
4	Aug 4 1988	F	Response requested -- CJ.
5	Aug 23 1988	X	Brief of respondent Dennis Straub in opposition filed.
7	Sep 30 1988		REDISTRIBUTED. October 7, 1988
9	Oct 11 1988		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
10	Oct 21 1988	G	Motion of petitioner for appointment of counsel filed.
11	Oct 31 1988		DISTRIBUTED. Nov. 4, 1988. (Motion of petitioner for appointment of counsel).
13	Nov 14 1988		Motion for appointment of counsel GRANTED and it is ordered that Douglas R. Mullkoff, Esquire, of Ann Arbor, Michigan, is appointed to serve as counsel for the petitioner in this case.
14	Nov 16 1988		Record filed.
		*	certified original record, one vol., rec.
15	Dec 19 1988		Joint appendix filed.
16	Dec 23 1988		Brief of petitioner Tyrone V. Hardin filed.
18	Jan 17 1989		Order extending time to file brief of respondent on the merits until February 6, 1989.
19	Feb 3 1989		SET FOR ARGUMENT WEDNESDAY, MARCH 22, 1989. (2ND CASE)
20	Feb 6 1989		Brief of respondent Dennis Straub filed.
21	Feb 8 1989		CIRCULATED.
22	Mar 8 1989	X	Reply brief of petitioner Tyrone V. Hardin filed.
23	Mar 22 1989		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

87-7023

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1988

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT, NO. 87-1538

TYRONE VICTOR HARDIN,

Petitioner,

v.

DENNIS STRAUB, WARDEN
SOUTHERN MICHIGAN PRISON,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

NOW COMES the Petitioner, Tyrone Victor Hardin, acting as his own attorney in pro se, and for his Motion to proceed in forma pauperis, states unto this Honorable Court as follows:

1. That on December 29, 1986, an Order granting Petitioner's Petition to Proceed in forma pauperis was granted by Magistrate Paul Komives of the United States District Court, Eastern District of Michigan, Southern Division.

WHEREFORE, your Petitioner respectfully request that this Honorable Court grant Petitioner's Motion to Proceed In Forma Pauperis, pursuant to Rule 46.

Respectfully submitted,

BY: _____

TYRONE VICTOR HARDIN pro se
(136097)
Petitioner-Appellant
777 W. Riverside Drive
Ionia, Michigan 48846

Dated: March 3, 1988

No.

IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1988

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT, NO. 87-1538

TYRONE VICTOR HARDIN,

Petitioner,

v.

DENNIS STRAUB, WARDEN,
SOUTHERN MICHIGAN PRISON.

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Tyrone Victor Hardin, being first duly sworn, deposes and says that I am the petitioner in the above-entitled cause; that in support of my motion to proceed without being required to prepay fees, cost or give security thereof, I state that because of my poverty I am unable to pay the costs of this case or give security thereof; and I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? "NO"
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.
My last date of employment was: 12/2/87, and I received approximately $574

2. Have you received within the past twelve months any income from a business, profession or other form of self employment, or in the form of rent payments, interest, dividends or other sources? "NO"

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings accounts? "NO"
a. If the answer is yes, state the total value of items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? "NO"

5. List the persons who are dependent upon you for support and state your relationship to those persons.
"Wife and four(4) children."

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

VERIFICATION

STATE OF MICHIGAN)
) ss.
COUNTY OF WASHTENAW)

Tyrone Victor Hardin (136097)

Subscribed and sworn to before me
this 6 day of April, 1988

Evelyn Broadus
Notary Public EVELYN P. BROADUS
Notary Public, Washtenaw County, MI
My Commission Expires Oct. 1, 1990

My Commission expires:

No.

IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1988

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT, NO. 87-1538

TYRONE VICTOR HARDIN,

Petitioner,

v.

DENNIS STRAUB, WARDEN,
SOUTHERN MICHIGAN PRISON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAS FOR THE SIXTH CIRCUIT

TYRONE VICTOR HARDIN (136097)
777 W. Riverside Drive
Ionia, Michigan 48846

QUESTION PRESENTED FOR REVIEW

I.

WHETHER THE SIXTH CIRCUIT COURT OF APPEAL COMMIT REVERSIBLE ERROR IN DETERMING THAT THE STATUTE OF LIMITATIONS WHICH TOOLS THE LIMITATION PERIOD FOR PERSONS THAT ARE INCARCERATED DOES NOT APPLY IN 42 USC 1983 CIVIL ACTIONS, AND THE SIXTH CIRCUIT COURT OF APPEALS FAILING TO CONSIDER THE TIME IN WHICH PETITIONER DISCOVERED THAT HE HAD A CAUSE OF ACTION FOR VIOLATIONS OF HIS RIGHTS GUARANTEED TO HIM UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA ?

LIST OF PARTIES

The parties in this proceeding, in the United States Court of Appeals for the Sixth Circuit, were as follows:

1. TYRONE VICTOR HARDIN,
   Petitioner-Appellant.

2. DENNIS STRAUB, WARDEN
   SOUTHERN MICHIGAN PRISON
   RESPONDENT-APPELLEE.

The Attorney General's office did not participate in this cause of action.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1988

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT, NO. 87-1538

TYRONE VICTOR HARDIN,
Petitioner,

v.

DENNIS STRAUB, WARDEN,
SOUTHERN MICHIGAN PRISON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Tyrone Victor Hardin, acting as his own attorney in pro se., prays that a Writ of Certiorari issue to review the December 18, 1987 decision and order of the United States Court of Appeals for the Sixth Circuit which affirmed the United States District Court for the Eastern District of Michigan, Southern Division, Order and Decision dismissing Petitioner's 42 USC §1983 complaint which was further denied by the Sixth Circuit's denial of Petitioner's Petition for Rehearing en banc, in an Order filed on February 18, 1988.

OPINIONS AND ORDERS BELOW

The Memorandum Opinion and Order of the United States District Court for the Eastern District of Michigan, Southern Division, is unreported and omitted in this appeal.

The Opinion of the United States Court of Appeals for the Sixth Circuit is set forth in Appendix A herein. The Order denying Petition for Rehearing en banc is set forth in Appendix B herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 18, 1987. An Order denying Petitioner's Petition for Rehearing en banc was filed on February 18, 1988 by the Court of Appeals for the Sixth Circuit. The mandate denying Petitioner's Rehearing en banc by the United States Court of Appeals for the Sixth Circuit was issued by the Sixth Circuit on February 18, 1988. The time for filing a Petition for Writ of Certiorari continues to May 17, 1988, pursuant to 28 USC § 2101(C). The jurisdiction of the United States Supreme Court is invoked under Title 28 USC § 1254 (1). Petitioner also relies upon the United States Constitution, Amendments One and Fourteen, Section 1. (See Appendix C).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 USC §1254 (1). (Court of Appeals; certiorari; appeal; (Appendix C-1, infra).

28 USC §2101 (c). (Supreme Court; time for appeal or certiorari; docketing stay) (Appendix C-1, infra).

42 USC §1983 (United States Code) (Appendix C-1, infra).

STATEMENT OF THE CASE

Petitioner Tyrone Victor Hardin, filed a 42 USC §1983 civil suit in the United States District Court on December 29, 1986, alleging that his Fifth, Eighth and Fourteenth Amendment rights were violated when he was placed in Administrative Segregation on October 24, 1980, by the Respondent herein, without affording him a hearing prior to or after placement in segregation.

Petitioner further alleged that he was subjected to cruel and unusual punishment while confined in segregation status at the Southern Michigan Prison.

On or about July 22, 1984, Petitioner was provided with a Rule Book of the Michigan Department of Corrections, which explained the procedures to be followed when a prisoner is placed in Administrative segregation.

On September 11, 1985 Petitioner filed for a copy of his classification report, and at which time he discovered that he had been placed in Administrative Segregation, hereinafter referred to as Adm. Seg., for the good and well order of the institution. And it was at this time that Petitioner also discovered that the Respondent had violated his Constitutional Rights by failing to conduct a hearing prior to or after placement in Adm. Seg.

Petitioner submits to this Honorable Court that he is ignorant of the law and it was not until he received his classification reports that he discovered that he had a cause of action that would best be handled in the United States District Court i.e. being that his constitutional Rights were violated by the Respondent herein.

On February 4, 1987, The United States District Court Judge Honorable Robert E. DeMascio, issued an Order dismissing the Complaint as frivilous. Holding that Petitioner's Complaint is timed barred under the three (3) year Statute of Limitations and the court not considering the time in which the Petitioner discovered that he had a cause of action in the Federal Courts.

On March 10, 1987, Petitioner filed a Motion to Vacate the judgment dismissing his complaint. Arguing that the statute of limitations was tolled by reasons of his incarceration. Said Motion did not arrive for filing in time, due to prison officials delayed in mailing the Motion in question thus said Motion was denied as being untimely.

On May 28, 1987, Petitioner filed a Notice of Appeal to appeal to the United States Court of Appeals For The Sixth Circuit for the order and decision dismissing his complaint.

On July 14, 1987, Petitioner submitted his Brief on appeal to the Sixth Circuit Court of Appeals, arguing that the United States District Court errored when it dismissed his 42 USC §1983 Civil Right Complaint under the three (3) year Statute of Limitations, and that the limitation period was tolled for persons incarcerated in prison, and the fact that Petitioner did not discover that he had a cause of action until he had received a Rule Book and received copies of his classification report in 1986.

On December 18, 1987, the United States Court of Appeals for the Sixth Circuit issued an Order affirming the District Court's dismissal of Petitioner's complaint, without giving any considera-

tion to the time in which Petitioner discovered that he had a cause of action, and the Sixth Circuit holding that the Statute of Limitation which tolls the period is which a prisoner can sue under section 1983 is not applicable and the District Court was correct in dismissing Petitioner's claim. (See Appendix A-2 and 3) hereto annexed and filed herewith.

On December 29, 1987, Petitioner filed a Motion for Rehearing en banc, arguing that the state tolling statute is the appropriate statute, and that the Sixth Circuit did not consider the fact when Petitioner discovered that he had a cause of action for the Constitutional violations in which he incurred while unduly confined in Adm. Seg. (See Appendix B-1) hereto annexed and filed herewith.

REASON FOR ALLOWANCE OF WRIT

ARGUMENT I.

THE SIXTH CIRCUIT COURT OF APPEALS COMMITTED REVERSIBLE ERROR IN DETERMINING THAT THE STATUTE OF LIMITATION PERIOD FOR PERSONS THAT ARE INCARCERATED DOES NOT APPLY IN 42 USC §19 83 CIVIL ACTIONS, AND THE SIXTH CIRCUIT COURT FAILURE TO CONSIDER THE TIME IN WHICH PETITIONER-APPELLANT DISCOVERED THAT HE HAD A CAUSE OF ACTION FOR VIOLATIONS OF HIS RIGHTS GUARANTEED TO HIM UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

Although the Sixth Circuit Court of Appeals found that the District Court was correct in dismissing the complaint under the three (3) years Statute of Limitations. It is the position of Petitioner that the courts errored in not applying the state tolling statute.

Petitioner contends that, in reaching its decision, the Corut did not consider most, if not all the pertinent facts in this case or all the constitutional errors involved.

While it might be interesting to point out, that, although individuals are incarcerated in prison, they are still members of the public within the meaning of the constitution of the United States of America and that their access to the judicial process has been impaired due to the lack of adequate knowledge of the law, which in itself, accounts for over ninety five percent of the pro se complaints being dismissed from the court today. Which in essence is the very reason why prisoners should be given additional time to assert their claims in the courts i.e. due to the lack of adequate knowledge of the law, and/or

counsel to litigate their causes of actions in the courts.

Generally, in civil rights actions the court must look to state law for the statute of limitations which applies in analogous state cause of actions, since §1983 and §1985 do not contain their own limitation provision. citing Kilgore v. City of Mansfield, 679 F. 2d (1982).

In Board of Regents v. Tomanio, 446 U.S. 478, 100 S. Ct. 1790, 64 L. Ed 2d 440 (1980), This Court held: "the question of whether a limitation period is tolled is an inherent aspect of the state statute of limitations. Since Federal Court must must look to the state for the statute of limitations in 1983 and 1985 actions, the courts are obligated to also apply state tolling statutes, as long as the result is not inconsistent with the constitution or Federal law."

Michigan tolling statute provides, in pertinent parts: If the person first entitled to . . . bring an action is . . . imprisoned at the time his claim accured, he . . . shall have one after his disability is removed through death or otherwise, to . . . bring the action although the period of limitations has run.

To be deem a disability, the imprisonment must exist at the time the claim accured. MCLA 600. 5851(1),(3); MSA 27A. 5851.

In Hawkins v. Justin, 109 Mich App. 743 (1981): The purpose of the statutory provision which tolls the limitations period in favor of persons imprisoned at the time of the accural of their cause of action is to be recognized that persons in

prison are under disability in that their freedom has been restricted and their access to the judicial process has been impaired and to provide such persons with additional time to assert their legal rights. MCLA 600.5851; MSA 27A.5851.

The statute provision which tolls the limitation period in favor of persons imprisoned at the accural of their cause of action provides for a disability in favor of all who are incarcerated when a cause of action accures and does not require a showing of special disability. MCLA 600.5851; MSA 27A.5851.

In the case of Covington v. Winger, 562 F. Supp. 115 (1983) the federal District Court held in that case that "the limitations period would be tolled by plaintiff's inccarceration." In contrast to the lower Federal Court's ruling in the instant case.

In Warren v. Bergeron, 831 F. 2d 101 (5th Cir. 1987) held: "No Federal Statute of limitation covers §1983 civil rights claims; rather the law of the state in which the alleged action arose controls. 42 USC §1983. Miller v Smith, 625 F. 2d 43 (5th Circuit 1980) rev'g 615 F.2d 1037 (5th Cir 1980).

Petitioner submits that the lower federal courts did not apply the state tolling statute in the instant cause as mandated in Board of Regents supra,

Petitioner further contends that the lower federal courts did not give any consideration to the fact that a cause of action is tolled until such time that the injured party discovers or has reason to know that a injury has accrued.

In Town of Hooksett School Dist. v. W.R. Grace Co., 617 F. Supp. 126 (D.C.N.H. 1984), The court states: "The limitations

period will not begin to run against the Plaintiff until such time as he discovers, or in the exercise of reasonable dilligence should have discovered, that he has been injured by the Defendants acts or omissions." See also EIMCO-BSP Service Co. v. Davison Construction Co., 547 F. Supp. 57, 59 (D.N.H. 1982); Drayden v. Needville Independent School District, 642 F. 2d 129 (5th Cir 1981).

In Warren v. Bergeron, supra, Stated: "A cause of action accrues on the date that a claimant either knows or should have known of his injury and its causal connection to the defendants acts.

While it is the position of the Petitioner that his access to the courts has been restricted by the failure of the lower courts to apply the state tolling statute, which precludes prisoner of the right to petition the united State Government for redress for constitutional violations under the First Amendment of the Constitution of the united States. The prohibiting the tolling statute in section 1983 civil actions, is in itself denies prisoners within its jurisdiction, the equal protection of the law guaranteed to them under the Fourteenth Amendment of the Constitution of the united States.

While it might be noted that it would be impossible to expect a pro se prisoner to bring a cause of action well within the mandated statute of limitations, especially when he lacks the legal capacity to petition the courts for a redress, vering in mind that persons in prison are under disability in that their freedom has been restricted and their access to the judicial process has been impaired due to the lack of adequate access to law

library and persons trained in the area of law to assist a pro se litigant with the meaningful filing of papers into the courts.

In Major v. Arizona State Prison, 642 F. 2d 311 (9th Cir. 1981), the Ninth Cir. Ct. of App. stated in pertinent parts: " a limitation period is tolled are dependent upon a determination of plaintiff's legal capacity to sue." No such determination was ever made in the instant cause as to Petitioner's legal capacity to sue or when Petitioner discovered his cause of action or had reason to know or should have known of his injury.

Substantial reasons have been propounded to this Court for the granting of a Writ of Certiorari with respect to this issue.

CONCLUSION

For all the foregoing reasons, Petitioner Tyrone Victor Hardin, respectfully requests that the Petition for Writ of Certiorari be granted, or in the alternative, that the Opinion and Order of the United States Court of Appeals For The Sixth Circuit affirming the District Court's dismissal of his complaint be summarily reversed, or if the Petitioner's complaint is to be dismissed, it be dismissed without prejudice i.e. being that no judgment on the merits of the complaint was ever made, so to enable the Petitioner to relitigate his cause of action into the state court.

Respectfully submitted,

BY: Ty Victor Hardin

Tyrone Victor Hardin
Petitioner, 777 W. River-side Dr., Ionia, MI 48846

Dated: March 3, 1988

No. 87-1538

FILED

DEC 18 1987

JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TYRONE VICTOR HARDIN,

Plaintiff-Appellant,

v.

DENNIS STRAUB,

Defendant-Appellee.

O R D E R

Appendix B

Before: WELLFORD, NELSON and BOGGS, Circuit Judges.

This pro se Michigan state prisoner appeals the district court's dismissal of his civil rights action, filed pursuant to 42 U.S.C. Section 1983. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and brief, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34.

Plaintiff alleged he was denied his fifth, eighth, and fourteenth amendment rights when he was placed in solitary confinement in 1980 and 1981 while incarcerated at the State Prison of Southern Michigan. The district court concluded that the suit was time-barred and dismissed it pursuant to 28 U.S.C. Section 1915(d).

No. 87-1538

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

FEB 18 1988

JOHN P. HEHMAN, Clerk

TYRONE VICTOR HARDIN,

Plaintiff-Appellant,

v.

DENNIS STRAUB,

Defendant-Appellee

ORDER

BEFORE: WELLFORD, NELSON and BOGGS, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TYRONE VICTOR HARDIN,

Plaintiff,

v.

DENNIS STRAUB,

Defendant.

Civil No. 86CV75355DT

Hon. Robert E. DeMascio

ORDER

ORDER

Plaintiff filed this pro se complaint pursuant to 42 U.S.C. § 1983. Plaintiff claims that he was placed in administrative segregation while incarcerated at the State Prison of Southern Michigan (SPSM) without a hearing as mandated in Michigan Department of Corrections Administrative Rule 791.4405. He requests monetary damages.

Plaintiff has been granted in forma pauperis status. Pursuant to 28 U.S.C. § 1915, a district court may sua sponte dismiss an in forma pauperis complaint before service on the defendants. Brooks v. Dutton, 751 F.2d 197, 199 (6th Cir. 1984). See also Spruyette v. Walters, 753 F.2d 498 (6th Cir. 1985), cert. denied 106 U.S. 788 (1986). The court may dismiss a case "if satisfied that the action is frivolous or malicious." Harris v. Johnson, 784 F.2d 222 (6th Cir. 1986). A complaint may be dismissed as frivolous only if "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." Malone v. Colyer, 710 F.2d 258, 260-61 (6th Cir. 1983).

The actions plaintiff complains of took place while he was incarcerated at SPSM. The complaint alleges that plaintiff was confined at SPSM in 1980 and 1981 and was transferred to the Marquette Facility in July 1981. Plaintiff is essentially

alleging a personal injury under the civil rights statute which is governed by the Michigan three-year statute of limitations. EEOC v. Detroit Edison, 515 F.2d 301, 315 (6th Cir. 1975); Marlowe v. Fisher Body, 489 F.2d 1057, 1063 (6th Cir. 1973). Since plaintiff did not file this action until December 29, 1986 it is time barred.

NOW, THEREFORE, IT IS ORDERED that the complaint be dismissed as frivolous, pursuant to § 1915(d).

Robert E. DeMascio
United States District Judge

Dated: FEB 26 1987

No. 87-7023

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

TYRONE VICTOR HARDIN,

Petitioner,

v

DENNIS STRAUB, Warden,

Respondent.

_____/

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
Counsel of Record

James L. Stropkai
Assistant Attorney General
763 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

QUESTION PRESENTED

WHERE A PRISONER ATTEMPTED TO BRING AN ACTION UNDER 42 USC § 1983 CHALLENGING CONDUCT BY PRISON OFFICIALS WHICH OCCURRED DURING HIS INCARCERATION, DID THE DISTRICT COURT ERR IN SUA SPONTE DISMISSING THE COMPLAINT FOR FAILURE TO COMPLY WITH THE THREE-YEAR STATUTE OF LIMITATIONS?

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STATUTES INVOLVED

The pertinent portions of the statutes involved are:

MCL 600.5805; MSA 27A.5805--

> "(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section."
>
> "(8) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property."

MCL 600.5851; MSA 27A.5851--

> "(1) Except as otherwise provided in subsection (7), if the person first entitled to make an entry or bring an action is under 18 years of age, insane, or imprisoned at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852."

STATEMENT OF THE CASE

It should be noted that the Respondent was, as far as can be determined, never served a copy of the complaint. He did not file any pleadings in the district court and only a letter was sent to the Sixth Circuit Court of Appeals stating that there was no participation in the lower court and nothing would be done on appeal unless requested by the court. The Court of Appeals did not request Respondent to participate in the appeal.

Since Respondent has made no independent investigation of the facts or claims made by Petitioner, it must be assumed for the purposes of this response only that the facts contained in the petition are true.

REASONS FOR DENYING THE WRIT

THE COMPLAINT WAS PROPERLY DISMISSED FOR RESPONDENT'S FAILURE TO FILE WITHIN THE TIME PRESCRIBED BY THE STATUTE OF LIMITATIONS.

According to Petitioner, he was improperly placed in administrative segregation on October 24, 1980 and subjected to cruel and unusual punishment while so confined (Petition p 4). In response to his claims of improper treatment, he filed a 42 USC § 1983 action on December 29, 1986, in the United States District Court for the Eastern District of Michigan. The events which formed the basis of his complaint took place over six years prior to the filing of the complaint. Petitioner further claims he was unaware of his improper treatment until he obtained a report and handbook in September of 1985.

Petitioner's claim accrued when he knew or through the exercise of reasonable diligence should have known that he had a possible cause of action. Grimm v Ford Motor Co, 157 Mich App 633, 403 NW2d 482 (1986), lv den 428 Mich 902, 406 NW2d 465. It is clear from the petition that Petitioner knew or should have been aware that he was being subjected to cruel and unusual punishment and improper administrative segregation in October of 1980. To claim that he was unaware until he read a report five years later lacks credibility on its face. Clearly, Petitioner's claim accrued in October of 1980 when the actions were allegedly taken against him.

In Wilson v Garcia, 471 US 261, 105 S Ct 1938, 85 L Ed 2d 254 (1985), this Court found that federal law requires that § 1983 claims for statute of limitation purposes should be characterized as personal injury action. In Michigan the statute of limitations for personal injury actions is three years from when the claim accrues. MCL 600.5805(8); MSA 27A.5805(8).

Michigan also has a statute which tolls the time for filing a suit under certain circumstances. In pertinent part the statute provides:

> " ... if the person first entitled to make an entry or bring an action is under 18 years of age, insane or imprisoned at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitation has run." MCL 600.5851(1); MSA 27A.5851(1).

In Board of Regents of the University of the State of New York v Tomanio, 446 US 478, 100 S Ct 1790, 64 L Ed 2d 440 (1980), it was held that a state statute tolling the statute of limitations is to apply to § 1983 actions so long as the results are not inconsistent with federal law or policy. The federal policies underlying § 1983 were identified in Campbell v Guy, 520 F Supp 53 (ED Mich, 1981), aff'd 711 F2d 1055 (CA 6, 1983), cert den 464 US 1051, 104 S Ct 731, 79 L Ed 2d 190

(1984), as "the compensation of prisoners whose federal rights have been violated as well as the prevention of an abuse of power by those acting under color of law." 520 F Supp at 55.

Clearly, the primary purpose of § 1983 is to deter unconstitutional behavior on the part of officials under color of law. To achieve this goal, it is necessary to assure that § 1983 claims are resolved as quickly as possible so that officials are aware of what conduct is appropriate and what conduct is not. This is especially true in the prisoner context where corrections officials are constantly making decisions and taking actions involving the activities and rights of prisoners. To allow § 1983 claims to linger until one year after a prisoner is released could allow such claims to be filed ten, fifteen, twenty years or longer after the actual events. Such delays do nothing to further the federal policy of deterrence and may, by allowing conduct to go unchallenged for a substantial period of time, encourage similar conduct. As this Court noted in Felder v Casey, 486 US ___, 108 S Ct 2302, 100 L Ed 2d ___ (1988):

> "Because statutes of limitation are among the universally familiar aspects of litigation considered indispensable to any scheme of justice, it is entirely reasonable to assume that Congress did not intend to create a right enforceable in perpetuity."

The tolling provision as applied in prisoner matters is clearly inconsistent with the federal policy of deterrence

implicit in § 1983 in that it allows persons aware of possible unconstitutional conduct to allow the conduct to continue and possibly affect others. Such delays in challenging conduct render the underlying policy of deterrence of § 1983 inconsistent with the tolling provisions.

The Court in Campbell v Guy, supra, further rejected the claim that being in jail was per se a disability for prisoners bringing § 1983 actions. Given the number of prisoner lawsuits filed by prisoners today, incarceration is not a deterrent to the filing of a lawsuit. The Sixth Circuit noted in Higley v Michigan Department of Corrections, 835 F2d 623 (1987):

> "We are accutely aware of the multitude of cases filed by other Michigan prisoners seeking § 1983 relief in federal courts [footnotes omitted]. The plethora of § 1983 cases filed indicates very clearly the accessibility of federal courts to prisoners such as Higley. There is no logical basis for applying a tolling period to encourage stale claims in the face of such ready availability of a federal forum to hear and consider these claims." 835 F2d at 626.

The Sixth Circuit recognized that the tolling provision contained in MCL 600.5851(1) was inapposite to the federal policy of deterrence when applied in § 1983 actions. This rationale is in conformity with existing Supreme Court precedent especially in light of the accessibility of courts by prisoners and a need to resolve § 1983 claims in an

expeditious manner so as to advance the underlying policy of deterrence. For these reasons the Court should deny the petition.

RELIEF

WHEREFORE, for the foregoing reasons, Petitioner has not met the criteria of Supreme Court Rule 17 and therefore, his petition should be denied.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
Counsel of Record

James L. Stropkai
Assistant Attorney General
763 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

Dated: August 23, 1988

(4)

No. 87-7023

In The

Supreme Court of the United States

October Term 1988

TYRONE VICTOR HARDIN,

Petitioner,

v.

DENNIS STRAUB,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

DOUGLAS R. MULLKOFF
(Appointed by this Court)
402 W. Liberty
Ann Arbor, Michigan 48103
(313) 761-8585

Counsel for Petitioner

LOUIS J. CARUSO
Solicitor General
State of Michigan
763 Law Building
525 W. Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

Counsel for Respondent

PETITION FOR CERTIORARI FILED MARCH 16, 1988
CERTIORARI GRANTED OCTOBER 11, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

December 29, 1986 – Order Granting Plaintiff's Petition to Proceed in Forma Pauperis.

December 29, 1986 – Civil Rights Complaint accepted for filing.

February 26, 1987 – Order and Judgment entered dismissing Complaint.

March 16, 1987 – Plaintiff's Motion to Vacate the Order of 2/26/87, and Memorandum in support filed.

May 21, 1987 – Order entered denying Plaintiff's Motion to Vacate.

May 28, 1987 – Plaintiff's Notice of Appeal from orders dated 2/26/87 and 5/21/87 filed.

December 18, 1987 – Opinion and Order of the Court of Appeals for the Sixth Circuit.

February 18, 1988 – Order Denying Petition for Rehearing by Court of Appeals for the Sixth Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
133 U.S. COURTHOUSE
DETROIT, MICHIGAN 48226

PRISONER CIVIL COMPLAINT FORM
UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. §1983

PLAINTIFF(S)

TYRONE VICTOR HARDIN #136097
(Plaintiff's Name) (Prison Number)

Huron Valley Men's Facility, 3201 Bemis Rd.,
Ypsilanti, MI 48197
(Place of Confinement) (Zip Code)

List any additional Plaintiff(s), Prison Number(s), and the Current Place of Confinement for each Plaintiff.

DEFENDANT(S)

YOU MUST FURNISH NAME AND COMPLETE CURRENT ADDRESS FOR EACH NAMED DEFENDANT

DENNIS M. STRAUB, Superintendent Northside Complex, 4000 Cooper St. Jackson, Michigan 49204

FILING INSTRUCTIONS

This packet includes a complaint form. To start a legal action, you *MUST FILE AN ORIGINAL AND ONE COPY OF THE COMPLAINT and any attachments* (the original and copy are required by the Court). *FOR EACH DEFENDANT THAT YOU WISH SERVED BY THE U.S. MARSHAL, YOU MUST FURNISH ONE ADDITIONAL COPY OF THE COMPLAINT AND ANY ATTACHMENTS.*

Your complaint must be either *typed or legibly handwritten. Your complaint must be submitted on 8 1/2" x 11" paper. You must sign the complaint and declare under penalty of perjury that the facts are correct.* If your complaint exceeds the space allotted here, you may use blank paper, *BUT,* it also must be *8 1/2" x 11".*

YOUR COMPLAINT MAY BE BROUGHT IN THIS COURT *ONLY IF ONE OR MORE OF THE NAMED DEFENDANTS IS LOCATED WITHIN THIS DISTRICT.*

You must file a separate complaint for each claim that you have, unless they are all RELATED to the same incident or issue.

YOU MUST FURNISH THE CORRECT NAME AND COMPLETE ADDRESS FOR EACH DEFENDANT.

FILING FEE

The filing fee for a civil action is $120.00 and must accompany the complaint.

IF YOU ARE UNABLE TO FURNISH THE FILING FEE AND SERVICE COSTS, YOU MUST COMPLETE THE ATTACHED APPLICATION TO PROCEED IN FORMA PAUPERIS. BE CERTAIN THAT YOU SIGN IT. AN OFFICIAL OF THE INSTITUTION IN WHICH YOU ARE INCARCERATED MUST INDICATE IN THE APPLICATION THE AMOUNT OF MONEY AND SECURITIES ON DEPOSIT TO YOUR CREDIT IN ANY ACCOUNT IN THE INSTITUTION. THE PRISON OFFICIAL MUST ALSO SIGN THE FORM. If your prison account exceeds $150.00, you must pay the filing fee and service costs.

REQUIRED FACTS

You are required to give *FACTS*. This complaint *SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.*

FAILURE TO COMPLY WITH ALL OF THESE INSTRUCTIONS WILL RESULT IN UNNECESSARY DELAYS IN FILING YOUR CASE.

I. *PREVIOUS LAWSUITS*

A. Have you begun other lawsuits in state or federal court dealing with the same facts in this action, or otherwise relating to your imprisonment?

YES [x] NO [ ]

B. If your answer is *"YES"*, describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another blank sheet of paper, (8 1/2" x 11").

C. Parties to this previous lawsuit:

Plaintiff(s): Ronald T. Wilder et al.

Defendant(s): Robert Brown Jr.

2. Court (If federal court, name the district. If state court, name county): Eastern District of Michigan

3. Docket Number (Case Number): 86-72971

4. Judge's Name: COOK

5. Disposition (dismissed, appealed or still pending): Still pending I assume

6. Approximate filing date: 7-10-86

   Approximate disposition date: unknown

II. *ADMINISTRATIVE REMEDIES*

A. Is there a prison grievance procedure in your institution?

   YES [x] NO [ ]

B. Did you present the current facts in the grievance procedure?

   YES [x] NO [ ]

C. If YES:

   1. What steps did you take?
   Sent the grievance to the above-mention
   Defendant and he never responded to it.

   2. What were the results?
   Never acknowledge receipt of any answer.

D. If NO, explain why not: _____

E. If no grievance procedure, did you complain to the authorities?

YES [ ] NO [ ]

F. If your answer is YES:

1. What steps did you take?

_____

_____

2. What was the result?

_____

_____

III. *STATEMENT OF FACTS*

State here, as BRIEFLY as possible, the FACTS of your case. Describe how each defendant is involved. Include the names of other persons involved, dates and places. *DO NOT GIVE ANY LEGAL ARGUMENTS OR CITE ANY CASES OR STATUTES.* If you intend to allege a number of related claims, NUMBER and set forth each claim on a blank 8 1/2" x 11" sheet(s) of paper and attach.

1) On 10/24/80 Plaintiff was delivered to the custody State Prison Southern Michigan, Reception & Guidance Center.

2) Upon entry Plaintiff was placed on "000" Administration Segregation.

When Plaintiff inquired why he has being assigned to Administration status, he was informed that it was due to his alleged County jail misconduct reports.

4) At no time did Plaintiff receive any type of an Administrative hearing as mandated R 791.4405, which states: Administrative segregation may be imposed only

when: "(a) A resident demonstrates inability to be managed with group;

(b) A resident needs protection from other prisoners (sic); (c) A resident is a serious threat to physical safety of staff or other prisoners; or the good order of the facility; (d) A resident is a serious escape threat; (2) A resident shall be afforded an opportunity for a hearing pursuant to Rule 791.3315 before being classified to administrative segergation (sic); however, a resident may be temporarily held in segregation status pending a hearing upon order of the institution head, or at the residents' request. This period may not exceed four (4) weekdays."

5) Plaintiff was denied his paramount right to a formal hearing, in short Plaintiff was rail-roaded. See exhibit (A) hereto annexed and filed herewith, where it states Mr. Hardin has been lodged in "000" section of R&GC since his arrival and shall remain there nutil (sic) his departure."

6) Plaintiff spent approximately 180 days in administration segregation without having been afforde (sic) any type of hearing, above all Plaintiff at no time broke any rules while at R&GC that would warrant being placed in segregation. See exhibit (F) where it states: "Due to the problems encountered at the counity (sic) jail, Mr. Hardin is being placed in a Toplock cell in R&GC."

7) At no time during Plaintiff's confinement in segregation did he once receive any weekly shower, or yard, or out of the receptacle recreation whatsoever. In short Plaintiff was force (sic) to remain in his cell 24 hrs. aday (sic) everyday.

8) Around January 1981 Plaintiff was placed in 5-Blk. detention cell at SPSM where he remained until early March 1981 which he was returned back to the Kent

County Jail on writ to await trial. It is noted that 5-Blk. was at the time known as the hole and is a far more server (sic) punishment. See Plaintiff's exhibit (D);(B);(C);(E) hereto annexed and filed herewith.

10) Plaintiff returned back to R&GC off writ on May 14, 1981 and was once again placed on Administrative Seg. and subsequently returned back to 5-Blk. and and (sic) placed in a detention cell until July 15, 1981 whereupon he was transferred to Marquette Branch Prison.

11) These are only one of many proceduer (sic) due process violations that go on daily behind the walls of Jackson Prison R&GC, and based upon information and belief they are still being employed up until this date.

12) Whenever a resident is classified to Administration Seg. Form CSO-447 must be used, which is call (sic) a Notice of Intent, No such Form was ever used, which the records will clearly reflect.

13) Defendant Straub was at which time responsible for the overall operation of R&GC and is the individual responsible for approving said segregation and maliciously violating Plaintiff's rights to procedures due process.

14) Defendant Struab (sic) is being sued in his personal and individual capacity for this paramount right to procedure due process, in which he vioated (sic).

15) The acts and omissions described herein constitute a violation of the 5th, 8th and 14th amendment of the Constitution of the United States.

16) Plaintiff has no complete or adequate knowledge of the law and has had to pay prison writ-writters (sic) in order to bring this action into this Honorable Court.

17) Taken all the factors into consideration in their totality the reader is only left with one conclusion and that being that Plaintiff was at all times denied his rights guaranteed to him under the Const. of the United States to equal protection of the law, To be free from cruel and unusual punishment and Due process of law.

WHEREFORE for all the foregoing reasons stated herein it is prayed that this Honorable Court GRANT the relief sought.

Respectfully Submitted,
/s/ T. Victor Hardin

V. *RELIEF*

(State BRIEFLY and *EXACTLY* what you want the Court to do for you. MAKE NO LEGAL ARGUMENTS – CITE NO STATUTES.)

Award Plaintiff the sum of $150.00 For cruel and unusual punishment; For the illicit segeragation (sic) which Plaintiff was subjected to; Mental anguish; Rights deprived of; Damages and Compensation. And Defendant Straub be ordered to also pay to Plaintiff the sum of $150,000.00. And that this Honorable Court appoint counsel to represent Plaintiff.

I declare, under penalty of perjury, that the foregoing is true and correct.

T. Victor Hardin
YOUR SIGNATURE

12-11-86
DATE

IF YOU SHOULD EXPERIENCE DIFFICULTY IN COMPLYING WITH ALL OF THESE INSTRUCTIONS, PLEASE CONTACT:

CLAY BURCH
THE CORRECTIONAL OMBUDSMAN
4TH FLOOR
FARNUM BUILDING
125 W. ALLEGAN
LANSING, MICHIGAN 48913

APPLICATION TO PROCEED IN FORMA PAUPERIS, SUPPORTING DOCUMENTATION & ORDER

DISTRICT	
United States District Court	
CASE TITLE	DOCKET NO.
Tyrone Victor Hardin v. Dennis M. Straub	MAGISTRATE CASE NO.

I, _____, declare that I am the (check appropriate box)

[x] petitioner/plaintiff [ ] movant (filing 28 U.S.C. 2255 motion)

[ ] respondent/defendant [ ] _____ other

in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay fees, cost or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to relief. The nature of my action, defense, or other proceeding or the issues I intend to present on appeal are briefly stated as follows:

In further support of this application, I answer the following questions.

1. Are you presently employed? Yes [ ] No [x]

   a. If the answer is "yes," state the amount of your salary or wages per month and give the name and address of your employer. (list both gross and net salary)

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

      Last employment date: 5/23/85 wages: approximately 21.00 dollars per month.

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or other form of self-employment Yes [ ] No [x]

   b. Rent payments, interest or dividends? Yes [ ] No [x]

   c. Pensions, annuities or life insurance payments? Yes [ ] No [x]

   d. Gifts or inheritances? Yes [ ] No [x]

   e. Any other sources? Yes [ ] No [x]

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in checking or savings account?

Yes [ ] No [x] (Include any funds in prison accounts.)

If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes [ ] No [x]

   If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

   Wife and four children and I contribute all of my wholly earning toward their support.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 12-11-86 (Date) — T. Victor Hardin (Signature of Applicant)

CERTIFICATE
(Prisoner Accounts Only)

I certify that the applicant herein has the sum of $ Tyrone Hardin #136097 on account to his credit at the $0.83 institution where he is confined. I further certify that the applicant likewise has the following securities to his credit according to the records of said institution:__

Jan M. Penn

Date 12-22-86

Authorized Officer of Institution

ORDER OF COURT

The application is hereby denied

The application is hereby granted. Let the applicant proceed without prepayment of cost or fees or the necessity of giving security therefor.

United States Judge Date

United States Judge or Magistrate Date

EXHIBIT (A)

Number C-136097 Name HARDIN, TYRONE VICTOR

Date 11-10-80

Reproduced by the State of Michigan

Reproduced by the State of Michigan

OPINIONS BY PROCESSOR

Tyrone Victor Hardin C-136097 was received in R&GC as a Parole Violator with a new sentence on 10-24-80. Mr. Hardin is currently charged with Assault Less than Murder and has a sentence of 6 1/2-10y and is also charged

with Possession of Firearm in Felony and has a 2y sentence further is charged with Carrying a Concealed Weapon and has a sentence of 2 1/2-5y. Mr. Hardin was on parole at the time this offense occurred for Assault to Armed Robbery and it should also be noted that Mr. Hardin escaped from juvenile institutions approximately four times and also escaped from a Correction Center in 1974. Mr. Hardin stated at the time of the interview and it is verified in the PSI that he is in fairly good health, with the exception of having blackouts from a head injury received several years ago.

Mr. Hardin made no comment at the time of the interview or when questioned as to his guilt in the instant offense. However, the facts as contained in the PSI stated that Mr. Hardin does not agree with the facts of the case as presented. Mr. Hardin says he was merely a passenger in the suspect vehicle, and had nothing to do with the robbery that occurred. Mr. Hardin has a long and extensive drug history however, has no problem with alcohol. As previously stated Mr. Hardin was approximately 12 years of age at the time of his arrest, and since has accumulated a long line of felony convictions. Mr. Hardin is a 25 year old black male who has never been married. It should be noted that during his stay in the county jail Mr. Hardin incurred many misconduct reports, some of the most serious being assault on guards with urine, threatening behavior, attempted assault etc. It should also be noted Mr. Hardin was found to be in possession of a homemade pistol. The pistol was constructed of soap and was thought to be made for use in the courtroom, as rumor would have it this individual was going to attempt an escape. It should also be noted that Mr. Hardin has a

poor institutional record on his prior incarceration having received many misconducts of varying types. Mr. Hardin refused to take an A.G.E. test when received in R&GC, however it is noted in his prior institutional record that he received a GED at SPSM during a prior incarceration. Mr. Hardin has a very sporadic work record in the community and was unemployed the majority of the time. It should also be mentioned that Mr. Hardin has a long drug history dating back many years, and at the time of the interview stated that he continues to be addicted. R&GC recommendations for Mr. Hardin are Routine Work Assignment coupled with a College Program, providing he can prove himself intellectually capable of handling college level work, and Drug Counseling Program of some type. Mr. Hardin has been referred to R&GC psychological staff for evaluation due to the above mentioned misconducts in the county jail and also due to the fact that he threatened to hang himself while he was in the county jail. Hopefully, more recommendations concerning Mr. Hardin will be forthcoming upon completion of the psychological report. For the good order and security of the institution, Mr. Hardin has been lodged in "000" section of R&GC since his arrival and shall remain there until his departure. From all indications Mr. Hardin constitutes a continuing threat to himself and others, and this should be taken into account upon placement.

Again it is stressed that this individual has been placed on "000" section of R&GC since his arrival, therefore has not incurred any misconducts, and also it is being stressed this individual was involved in many types of misconducts in the county jail. Mr. Hardin is currently

viewed as a management problem and from all indications will continue to be.

William Bailey
Acting Transcase Processor

Consultant: Thomas Martin-Yannitelli, ACSW
Clinical Social Worker

EXHIBIT (B) and (C)

MICHIGAN DEPARTMENT OF CORRECTIONS
Reception & Guidance Center

PSYCHOLOGICAL REPORT

NAME	NUMBER	INTERVIEW DATE
HARDIN, TYRONE VICTOR	C136097	11/12/80
OFFENSE	**TERM**	**AGE**
Aslt Less Murder, CCW & Poss Firearm in Fel 2 Cts	6 1/2-10y, 2 1/2-5y & 2y ea.	25

TYPE OF INTERVIEW:	[X] Intake Diagnostic [ ] Parole Board Pre-Release [ ] Reduced Custody Screening [ ] Discharge Evaluation [ ] Crisis Intervention Contact [ ] Other (Specify) _____	
TESTS ADMINISTERED:	[ ] MMPI [ ] DAP [ ] B-G [ ] ISB [ ] CPI	[ ] Rorschach [ ] TAT [ ] Other (Specify) _____ [ ] None

REASON FOR REFERRAL: Mr. Hardin was referred to the undersigned by the Deputy, Mr. Dennis Straub, for a

current psychological evaluation as the resident was returned to this institution as a parole violator, having incurred a serious crime of Assault Less Murder while on parole

CLINICAL IMPRESSIONS: It was reported that Mr. Hardin is the third of eight children born to the union of his natural parents who marriage remained intact until the father died in 1970. His father described as being "shell shocked" as a result of his war experience, and also as having a serious drinking problem prior to his death. His mother is reportedly extremely obese and because of her immobility, has been quite unable to exercise any control over the resident's behavior or activities. She was also described as being mentally disturbed. The resident's juvenile criminal history started shortly after the family moved to Grand Rapids in 1966 when the resident was about 12 years old. The resident left home shortly after his father's death in 1970 and by this time he was well entrenched in an antisocial lifestyle. He has literally had a very extensive juvenile criminal history and in accordance to his adult record, he has only spent in the community a few months over the past seven years. His lengthy criminal history consisted mainly of property and assaultive offenses. It should be pointed out that this resident has developed a pattern of committing robberies while either on escape or parole status. He was also admittedly involved in the use of marijuana and barbiturates (sic) beginning in 1971 which led into his heroin habit. It should be pointed out that while incarcerated at the Kent County Jail, he made a gun out of black soap that was to be used in his attempt to escape from the court. Also, another gun of a similar nature was found on

another inmate in jail, believed to be made by the same person. In addition, Mr. Hardin refused to be locked up and flooded his cell block. He also threatened the jail guards, attempted to fight them, throwing urine at them and broke a glass light. While he was placed in the sick bay at the county jail he attempted to hang himself.

It should be noted at the onset that the present psychologist has had several interviews with Mr. Hardin in his "000" cell, and in one of these interviews Mr. Hardin gave as his reason for refusing medical examination that he belonged to a religious group called "Saint Worshipers" but when asked, Mr. Hardin was not able to mention the religious leader as well as the place of gathering. However, after he was told that he would probably have to be locked up in 5 Block to protect the other residents from any possible contagious disease, Mr. Hardin appeared to change his mind by indicating his willingness to be medically examined. In addition, Mr. Hardin gave the impression that he has become both street wise and prison wise possessing a considerable amount of manipulative skills. As further example of his manipulative ability, with the assistance of his attorney, he petitioned the court for a psychiatric evaluation stating the he was displaying erratic behavior, and may not be able to competently aid his attorney in his defense and, furthermore, may have been legally insane at the time of the present offense. However, the center for forensic psychiatry in Ann Arbor declared him as feigning mental illness and that he was quite capable of answering all questions appropriately. Further Mental Status Examination by the present psychologist has revealed no associative or affective disturbances as Mr.

Hardin's thinking and reasoning processes were coherent, rational and relevant, his affect was appropriate all the time to the topics and circumstances at hand. The range of his emotional expressions was also within the normal limits, with no indication of any exaggerations such as flatness or blunting. His memory for instant and distant events was intact, except when he deliberately attempted to distort or block it. He was alert and oriented as to person, time and place, and no experiences of a hallucinatory or delusional nature were elicited during the interview. There was further no evidence of any active psychotic processes.

Besides medical examination, Mr. Hardin also refused testing. However, a study of his previous test results has revealed at least two predominant features in his personality, sociopathic proclivities and extreme immaturity with narcissistic and hedonistic tendencies. As a result, he is likely to be primarily in search for immediate satisfaction of his desire and to have difficulties handling extreme pressures or stress. Under these circumstances, he is very likely to act impulsively without considering the consequences of his actions. If one takes into consideration Mr. Hardin's early family background, in which the father was incapacitated and a heavy drinker, and the mother had no control over him in any way, The development of the sociopathic tendencies and his immature personality should come as no surprise. His association at first with a negative peer group, and later with people of questionable reputations, has given the content to his existing sociopathic tendencies and immaturity. It is interesting to point out that in a structured setting with adequate supervision and control, Mr. Hardin appears to

have been able to perform well. This has been exemplified during his prison terms at the Michigan Reformatory, SPSM, and the Michigan Training Unit. For example, at the Reformatory he was regarded as a highly responsible worker in the Furniture Factory. At the SPSM he worked in the License Plates and completed his GED. At the MTU, he held a responsible position in the Food Service department and maintained a clear conduct record. During his incarceration he also completed Narcotics Anonymous and Alcoholics Anonymous Programs, and was regularly involved in the Jaycees. These were probably the reasons that qualified him for parole. As has been mentioned, within the last 12 years he lasted only three months in the community. At the present time, he has indicated his interest in pursuing more education at a business college and in the institutional work routine.

RECOMMENDATIONS: On the basis of Mr. Hardin's personality characteristics, his extensive criminal record, and his present interests, it is recommended that he be involved in the institutional educational programs. It is also recommended that he be involved in a Group Psychotherapy for Impulse Control at a later date during his incarceration.

Pek-Sin Jo, M.A.
Clinical Psychologist

EXHIBIT (D)

Number C-136097 Name HARDIN, TYRONE VICTOR
Date

CLINICIAN'S OPINIONS

ADDENDUM:

This Classification Committee notes that after reading the Sheriff's Questionnaire that Mr. Hardin had an extremely poor county jail adjustment. He was cited for "swearing at the guards, flooding cell block, refusing to lock up, threatening to fight guards, being in possession of a tatooing needle, throwing urine on guards as well as inmates, breaking glass lights, and possession of a home-made gun." This Committee would note that the home-made gun found was to be used at the court in an attempt to escape. Also, according to the Sheriff's Questionnaire, another homemade gun out of soap was found in the possession of another inmate of which was believed to have been made by Hardin also. Further reports indicate that this gun was made out of black soap and hid inside a book of which had been cut out so as to insert this gun in. At the time of Mr. Hardin's classification, he reported that he had enemies by the name of Eddie Yarbrough, #137269, who is located at MIPC; Paul Harris, #121394, who is located at the Marquette Branch Prison, and Larry Bowlson, #133043, who is also located at Marquette. Reviewing Mr. Hardin's previous institutional adjustment, we note that he was located at Jackson for a short period between 6-77 until that of 4-78. During that period at SPSM Complex, it would appear that Mr. Hardin made adequate adjustment. His Deputy File was reviewed by this committee prior to this classification. In view of the above mentioned factors, Mr. Tyrone Hardin is being classified as SPSM Maximum to be placed in 5 block until such time as he can be viewed by the Assistant Deputy in charge of Security and Custody, Mr. Dwayne Sholes.

Dennis M. Straub
Deputy Superintendent - R&GC

Exhibit (E)

MICHIGAN DEPARTMENT OF CORRECTI

CSO-104-, Rev. 6/78

BASIC INFORMATION

EFFECTIVE DATE | PLACEMENT | RECOMMENDED BY

C136097 HARDIN,TYRONE VICTOR NO6
Aslt Less Murder 6½-10 10-24-80
Poss Firearm in Fel 2y MM55n
Kent

C136097 HARDIN,TYRONE VICTOR NO6
CCW 2½-5 10-24-80
Poss Firearm in Fel 2y MM55N
Kent

☒ MAX ☐ CLOSE ☐ MED ☐ MIN
☒ SEGR - ADMIN/PROTECTION

By Authority PD-BCF 34.01 By Authority MCL 791.264

TRANSFER AS INDICATED ABOVE IS HEREBY ORDERED

CLASSIFICATION COMMITTEE: Straub, Kirby, Wilcox

0 2 0 2 5 3 BIRTHDATE 2 5 AGE
US CITIZENSHIP 0 0 DEPENDENTS
1 1 1 0 5 0 DATE OF INTERVIEW

MANAGEMENT

CRITERIA:

SOURCE CODES
I: Interview
T: Tests
P: PSI
IR: Institutional Record
CR: Community Record

X Pending Charge/Hold/Probation Violation
Kent Cty Robbery Armed (Parole Violator)
Docket 79-255377FY
Offense Max. Time Docket No. Jurisdiction

___ History of ☐ Arson ☐ Drug Sales ☒ Assault ☐ Sex Offense ☐ Professional Criminal ☐ Involved in Organized Crime ☐ Drug Trafficker

X Medical-Psychological Considerations ☐ None
Physical Problem Complaint Bkle Pain
Special Diet/Medication (type)
Severe Psychological Problem/Hospitalization ___ Past ___ Present
Suicide Potential/Chronic Depression ___ Past ___ Present

___ Escape History ☐ None
☐ Adult Institution ___ Close ___ Medium ___ Minimum Within ___ Years
☒ Juvenile Institution 4 times Within ___ Years
☐ AWOL Within ___ Years
☒ Other (specify) Corrections Center 1974 Within 06 Years

___ Policy Psych Case P IR CR
___ Mental Hospital Within 2 Years
X Predatory Sexual Offenses 1974
___ Institutional Assaults Cty Jail
___ Sadism/Torture/Physical Cruelty
6 mo prior to Sentence
Screening Date ___/___/___
___ Co-Defendent/Enemy in System:

___ Adjustment Problems ☐ None
___ Guilty but Mentally Ill
X Violent Crime with Injury or Death
X Assaultive Pattern
___ Belligerent to Authority
X Homosexual Tendencies X Predatory ___ Passive
___ Poor Prior Adjustment
___ Deficient Coping Skills

Cty Jail "B" Sentence 1974

NONE

Name Number Place Name Number Place

STATISTICAL VIOLENCE RISK

Violence Prediction: X Very High ___ High ___ Middle ___ Low ___ Very Low ___ Insuf. Data
Property Prediction: X High ___ Middle ___ Low ___ Insuf. Data
02 Number of Prior Prison Terms 01 Number of Adult Probations 12
Juvenile Record ☐ Before Age 15 ☐ Commitment ☐ Probation ☐☐ Age at 1st Arrest
☐ Married at Offense or Prior ☐ Current ☒ Never
X Instant Offense Assaultive Notice of Very High or High Risk X Sent ___ N/A

very High Prop Asslt

PAROLE CONTRACT

___ Accepted ___ Not Eligible (EXPLAIN BELOW) ___ Declined by Client Objectives:

COMMENTS:

COPIED FOR

DISTRIBUTION: White - Institution; Green - Counselor; Canary - Lansing
Pink - P.S.U.; Golden Rod - Data Systems

RECEPTION & GUIDANCE CENTER RECOMMENDATIONS

EXHIBIT (F)

MICHIGAN DEPARTMENT OF CORRECTIONS
Reception & Guidance Center

PSYCHOLOGICAL REPORT

NAME	NUMBER	INTERVIEW DATE
HARDIN, TYRONE	136097	10/24/80
OFFENSE	TERM	AGE
		25

TYPE OF INTERVIEW:
[ ] Take Diagnostic
[ ] Parole Board Pre-Release
[ ] Reduced Custody Screening
[ ] Discharge Evaluation
[x] Crisis Intervention Contact
[ ] Other (Specify) _____

TESTS ADMINISTERED:
[ ] MMPI [ ] Rorschach
[ ] DAP [ ] TAT
[ ] B-G [ ] Other (Specify)
[ ] ISB _____
[ ] CPI [x] None

Mr. Hardin was seen on an emergency basis when intake personel noted information contained in the Sheriff's Questionnaire from the county jail which indicated that Mr. Hardin had experienced severe adjustment problems there. These problems included refusing to lock up, threatening to fight officers, flooding his cell, possession of a homemade gun, and at least one suicide attempt.

Upon interview Mr. Hardin stated that all of the above problems were part of his attempt to feign mental illness in an attempt to receive a lighter sentence or other special

privileges. He states that the suicide incident was not a bona fide attempt to hurt himself, but rather just one more manipulation on his part. He denies having had the gun in his possession, stating that another resident and officers "gave me the gun" so as to have further evidence against him. In March of this year, Mr. Hardin was found competent to stand trial by the Forensic Center, and was thus tried and sentenced 7 1/2-20y on a combination of violent, assaultive charges. At the time of this interview, Mr. Hardin is found to be without gross psychopathology, well-oriented in all three psychological spheres, and displaying intact remote and immediate memory. It is felt that Mr. Hardin's behavior at the county jail was indeed manipulative and not the result of significant psychotic disorganization. Mr. Hardin presents himself as an individual who leads a rather hedonistic lifestyle, seemingly without regard to the consequences of any of his actions. He has an extensive drug abuse history as well as an extensive criminal history, dating from his juvenile years. Records indicate that he has been in the community only three months during the past seven years, the rest of the time having been spent in various criminal institutions. Custody staff should be aware that Mr. Hardin tends to employ manipulative means, sometimes of a dangerous nature, in an attempt to meet his needs. He states that, having failed in his ploy to be named guilty but mentally ill, he currently plans no further disruption of institutional procedures. However, his crime involves an assault with a firearm upon law enforcement officials, and his general attitude indicates that Mr. Hardin has significant problems dealing with authority. Therefore, it is anticipated that he may encounter adjustment problems during

his incarceration, although this is the third time he has been here at Jackson.

Due to the problems encountered at the county jail, Mr. Hardin is being placed in a Toplock cell in R&GC. No Psychiatric Clinic referral is seen as appropriate at this time.

/s/ Diane B. Lothrop
Diane B. Lothrop, M.S.
Clinical Psychologist

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TYRONE VICTOR HARDIN,
Plaintiff,

v.

DENNIS STRAUB,
Defendant.
_____/

Civil No. 86CV75355DT

Hon. Robert E. DeMascio

ORDER
(Filed February 26, 1987)

Plaintiff filed this pro se complaint pursuant to 42 U.S.C. § 1983. Plaintiff claims that he was placed in administrative segregation while incarcerated at the State Prison of Southern Michigan (SPSM) without a hearing as mandated in Michigan Department of Corrections Admistrative Rule 791.4405. He requests monetary damages.

Plaintiff has been granted *in forma pauperis* status. Pursuant to 28 U.S.C. § 1915, a district court may *sua sponte* dismiss an *in forma pauperis* complaint before service on the defendants. *Brooks v. Dutton*, 751 F.2d 197, 199 (6th Cir. 1984). *See also Spruyette v. Walters*, 753 F.2d 498 (6th Cir. 1985), *cert. denied* 106 U.S. 788 (1986). The court may dismiss a case "if satisfied that the action is frivolous or malicious." *Harris v. Johnson*, 784 F.2d 222 (6th Cir. 1986). A complaint may be dismissed as frivolous only if "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Malone v. Colyer*, 710 F.2d 258, 260-61 (6th Cir. 1983).

The actions plaintiff complains of took place while he was incarcerated at SPSM. The complaint alleges that plaintiff was confined at SPSM in 1980 and 1981 and was transferred to the Marquette Facility in July 1981. Plaintiff is essentially alleging a personal injury under the civil rights statute which is governed by the Michigan three-year statute of limitations. *EEOC v. Detroit Edison*, 515 F.2d 301, 315 (6th Cir. 1975); *Marlowe v. Fisher Body*, 489 F.2d 1057, 1063 (6th Cir. 1973). Since plaintiff did not file this action until December 29, 1986 it is time barred.

NOW, THEREFORE, IT IS ORDERED that the complaint be dismissed as frivolous, pursuant to § 1915(d).

/s/ Robert DeMascio
Robert E. DeMascio
United States District Judge

Dated: FEB 26 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(Title omitted in printing)

Civil No. 86CV75355DT
Hon. Robert E. DeMascio

JUDGMENT
(Filed February 26, 1987)

This cause comes before for the court on a complaint filed pursuant to 42 U.S.C. § 1983, and the court having filed its Order,

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED

that plaintiff's complaint be and the same hereby is DISMISSED as frivolous, pursuant to 28 U.S.C. § 1915(d).

Dated at Detroit, Michigan, this 26th day of FEBRUARY, 1987.

/s/ Robert DeMascio
Robert E. DeMascio
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(Title omitted in printing)

Civil No. 86CV75355DT
Hon. Robert E. DeMascio

MOTION TO VACATE
(Filed March 16, 1987)

NOW COMES Tyrone Victor Hardin, Plaintiff, acting as his own attorney in *pro se* and moves this Honorable Cocut (sic) for an order pursuant to Rule 59(e) of the Federal Rules of Civil Procedure vacating the judgment of this court, entered on February 26, 1987, which dismissed Plaintiff's complaint. This motion is based on the papers and files in this matter and the memorandum of law attached hereto.

/s/ T. Victor Hardin
Tyrone Victor Hardin, in pro se

Dated: March 5, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(Title omitted in printing)

Civil No. 86CV75355DT
Hon. Robert E. DeMascio

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE
(Filed March 16, 1987)

In *Gaine* vs. *Lane*, 790 F.2d 1299 (1986) the Court stated:

> "It is well settled that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Citing: *Benson* vs. *Cady*, 761 F.2d 335, 338 (1985).

Also, in *Mitchell* v. *Beaubouef*, 581 F.2d 412 (1978): "If the complaint is deemed legally sufficient under this liberal standard appropriate to this type of case, then service of process on the defendant . . . is required pursuant to Fed. R. Civ P. 4 (a)."

In *Boyce* v. *Alizaduh*, 595 F.2d 948, 952 (1979): "It is essential for the district court to find 'beyond doubt' and under any 'arguable' construction, 'both in law and in fact' of the substance of the plaintiff's claim that he would not be entitled to relief."

In the instant case in chief, this Honorable Court is precluded from dismissing the complaint under the civil rights statute which in (sic) governed by the Michigan three-year statute of limitations.

Generally, in civil r[illegible]ctions the court must look to state law for the statute of limitations which applies in analogous state cause of action, since 1983 and 1985 do not contain their own limitations provision. *Kilgore* v. *City of Mansfield*, 679 F.2d 632 (1982).

In *Board of Regents* v. *Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L. Ed 2d 440 (1980), the Supreme Court held: the question of whether a limitations period is tolled is an inherent aspect of the state statute of limitations. Since Federal Court must look to the state for the statute of

limitations in 1983 and 1985 actions, the courts are obligated to also apply state tolling statutes, as long as the result is not inconsistent with the constitution or Federal Law.

Michigan tolling statute provides, in pertinent parts: If the person first entitled to . . . bring an action is . . . imprisoned at the time his claim accured, he . . . shall have one year after his disability is removed through death or otherwise, to . . . bring the action although the period of limitations has run.

To be deemed a disability, the imprisonment must exist at the time the claim accured. M.C.L.A. 600. 585 (1),(3).

In *Hawkins* v. *Justin*, 109 Mich App. 743 (1981): The purpose of the statutory provision which tolls the limitations period in favor of persons imprisoned at the time of the accural of their cause of action is to be recognized that persons in prison are under disability in that their freedom has been restricted and their access to the Judical (sic) process has been impaired and to provide such persons with additional time to assert their legal rights. M.C.L.A. 600.585; M.S.A. 27A.5851.

The statute provision which tolls the limitations period in favor of persons imprisoned at the time of the accural of their cause of action provides for a disability in favor of all who are incarcerated when a cause of action accures and does not require a showing of special disability. M.C.L.A. 600. 5851; MSA 27A. 5851.

RELIEF

WHEREFORE, for all the foregoing reasons stated herein, plaintiff demands that this Honorable Court GRANT this Motion to Vacate and reverse the initial decision dismissing plaintiff's complaint under the three-year statute of limitations, which does not apply to plaintiff in this cause. As law and justice demands

Respectfully submitted,

/s/ T. Victor Hardin
Tyrone Victor Hardin, in pro se
#136097, 3201 Bemis Rd.
Ypsilanti, MI 48197

Dated: March 5, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(Title omitted in printing)

CIVIL ACTION NO. 86-5355

HONORABLE ROBERT E. DEMASCIO

ORDER
(Filed May 21, 1987)

This matter is before the court on plaintiff, Tyrone Victor Hardin's motion to vacate this court's February 26, 1987 judgment dismissing his civil rights action. It appearing to the court that plaintiff's motion was not filed until March 16, 1987 and is therefore untimely, Fed. R. Civ. P. 59(e); .

NOW, THEREFORE, IT IS ORDERED that plaintiff's motion to vacate be and the same hereby is DENIED.

/s/ Robert DeMascio
Robert E. DeMascio
United States District Judge

Dated: MAY 21, 1987

No. 87-1538

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Title omitted in printing)

ORDER
(Filed Dec. 18, 1987)

Before: WELLFORD, NELSON and BOGGS, Circuit Judges.

This pro se Michigan state prisoner appeals the district court's dismissal of his civil rights action, filed pursuant to 42 U.S.C. Section 1983. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and brief, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34.

Plaintiff alleged he was denied his fifth, eighth, and fourteenth amendment rights when he was placed in solitary confinement in 1980 and 1981 while incarcerated at the State Prison of Southern Michigan. The district court concluded that the suit was time-barred and dismissed it pursuant to 28 U.S.C. Section 1915(d).

No. 87-1538

Upon examination of the record, we conclude that the district court was correct in finding plaintiff's claim barred by Michigan's statute of limitations. M.S.A. 27A.5805(8) limits the time in which personal injury actions may be brought to three years. This statute governs constitutional claims under section 1983 as well. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). Plaintiff filed an

action on December 29, 1986 for injuries alleged to have occurred in 1980 and 1981. This late filing puts plaintiff's claim outside the terms of the Michigan statute, and the three year period may not be tolled in prisoner section 1983 claims. *Higley v. Michigan Department of Corrections*, No. 86-1688 (6th Cir., December 15, 1987).

The district court correctly dismissed plaintiff's claim, and therefore we AFFIRM the decision of the district court. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
/s/ Illegible
Clerk

No. 87-1538

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Title omitted in printing)

ORDER
(Filed February 18, 1988)

BEFORE: WELLFORD, NELSON and BOGGS, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman
John P. Hehman, Clerk

SUPREME COURT OF THE UNITED STATES

No. 87-7023

Tyrone Victor Hardin

Petitioner

v.

Dennis Straub

ON PETITION FOR WRIT OF CERTIORARI TO THE United States Court of Appeals for the Sixth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted is limited to Question 1 presented by the petition.

October 11, 1988

SUPREME COURT OF THE UNITED STATES

No. 87-7023

Tyrone Victor Hardin

Petitioner

v.

Dennis Straub

ON CONSIDERATION of the motion of petitioner for appointment of counsel,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted and it is ordered that Douglas R. Mullkoff, Esquire, of Ann Arbor, Michigan, is appointed to serve as counsel for the petitioner in this case.

November 14, 1988

(5)

No. 87-7023

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TYRONE VICTOR HARDIN,

Petitioner,

v.

DENNIS STRAUB,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF PETITIONER

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39pp

QUESTION PRESENTED

Where a Michigan prisoner's 42 USC Section 1983 cause of action arose during confinement, did the lower courts err by refusing to apply Michigan's statute of limitations' tolling provision which extends a prisoner's time for bringing an action until one year after his release?

PARTIES

The petitioner in this Court is Tyrone Victor Hardin, who was the plaintiff in the proceedings below. The respondent is Dennis Straub, who the petitioner alleges was in charge of the Reception and Guidance Center at the State Prison of Southern Michigan, in Jackson, Michigan, when the petitioner's cause of action arose.

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TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the U.S. District Court for the Eastern District of Michigan was unreported and is reprinted in the Joint Appendix at 26. The opinion of the U.S. Court of Appeals for the Sixth Circuit was also unreported and is reprinted in the Joint Appendix at 34.

JURISDICTION

The Court of Appeals issued its decision on December 18, 1987. A timely petition for rehearing *en banc* was denied on February 18, 1988, and the mandate issued on March 17, 1988. A petition for certiorari was filed within ninety days. Jurisdiction in this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 USC Sec. 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC Sec. 1988:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS', and of Title 'CRIMES', for the protection of all persons in the United States in their civil rights, and for their vin-

> dication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . .

MCL 600.5805.(1):

> A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

MCL 600.5805(8):

> The period of limitations is 3 years after the time of death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

MCL 600.5851(1)

> Except as otherwise provided in subsection (7), if the person first entitled to make an entry or bring an action is under 18 years of age, insane, or imprisoned at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852.

STATEMENT OF THE CASE

Petitioner Tyrone Victor Hardin was transferred from the Kent County Jail to the State Prison of Southern Michigan in Jackson on October 24, 1980. J.A. at 6. Upon his arrival at the state facility, he was taken to the Reception and Guidance Center and placed in administrative segregation. He remained at the Center on "000" segregation status until January, 1981, when he was placed in a detention cell in 5-Block, which at that time was the prison's segregation unit.

Petitioner remained confined to his cell in 5-Block until early March, 1981, when he was returned to the Kent County Jail for trial. On May 14, 1981, petitioner came back to the state prison, where he was again placed in segregation at the Center and subsequently re-assigned to detention in 5-Block. Petitioner remained in detention in 5-Block until July 15, 1981, when he was transferred from Jackson to Marquette Branch Prison. J.A. at 8. In all, petitioner served close to 180 days in segregation, much of the time confined to his cell twenty-four hours a day.

Petitioner alleges that pursuant to Michigan Department of Corrections regulations, Rule 791.4405, administrative segregation may only be imposed on residents for certain violations, and pursuant to Rule 791.3315, a resident shall be afforded an opportunity for a hearing before being classified to administrative segregation. Petitioner claims that at no time from October 24, 1980, to July 15, 1981, was he given the required hearing. J.A. at 7.

In October, 1980, petitioner was twenty-five years old and had been incarcerated for all but three months of the previous seven years. J.A. at 17. Petitioner also had an

extensive juvenile record dating back to 1967, when he was twelve years old. J.A. at 17. Petitioner's formal education is not known from the record; he apparently completed a General Education Diploma (G.E.D.) during an earlier incarceration at Jackson. J.A. at 20. Petitioner states that not until July 22, 1984, was he provided with a rule book of the Michigan Department of Corrections which contained the procedures to be followed when a resident is placed in administrative segregation. And not until September, 1985, when petitioner saw a copy of his classification report, did he learn that he had been placed in administrative segregation for reasons that might conflict with the rules. (See Petition for Certiorari, at 4.)

Petitioner filed this action in the Eastern District of Michigan on December 24, 1985. The complaint alleged that petitioner's confinement in segregation without a hearing in 1980 and 1981 violated his rights under the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution, contrary to 42 U.S.C. Sec. 1983. The complaint also alleged that petitioner had no legal knowledge and that he had to pay prison writ-writers in order to bring his complaint. J.A. at 8.

Pursuant to 28 U.S.C. Sec. 1915, the district court *sua sponte* reviewed the merits of the complaint with the *in forma pauperis* petition, prior to service on the defendant. On February 26, 1986, the district court dismissed the complaint as frivolous, holding that petitioner's action was barred by Michigan three-year statute of limitations. J.A. at 26. Petitioner's motion to vacate the dismissal was denied as untimely. J.A. at 33.

On appeal to the Court of Appeals the case was assigned to a panel pursuant to Rule 9, Rules of the Sixth Circuit, which permits summary disposition of frivolous

cases. The court declined the Michigan Attorney General's offer to participate in the appeal (*see* Brief for Respondent in Opposition to Certiorari, at 1), and affirmed the district court without oral argument.

The Sixth Circuit panel said that petitioner's action was time-barred under the rule of *Higley* v. *Michigan Department of Corrections*, 835 F.2d 623 (CA 6, 1987), which held that Michigan's statute of limitations' tolling provisions do not apply to prisoners' claims under 42 U.S.C. Sec. 1983. Petitioner's request for rehearing *en banc* was denied, and the Court of Appeals' mandate issued on March 17, 1988. Mr. Hardin timely filed a *pro se* Petition for Certiorari and this Petition was granted on October 11, 1988.

SUMMARY OF ARGUMENT

The question in this case is whether a federal court hearing a state prisoner's section 1983 case must apply that state's imprisonment tolling statute. Since the Civil Rights Acts contain no statutes of limitations, this Court has held that trial courts shall apply statute of limitation law and interrelated tolling provisions of the state where the action arises, unless the state law is found to be inconsistent with federal law. *Board of Regents* v. *Tomanio*, 446 US 478 (1980). The court below has properly identified MCL 600.5805(1) (3 year statute) and MCL 600.5851 (tolling) as the applicable Michigan statutes. The court below has properly recognized that Michigan courts would apply MCL 600.5851(1) to toll this action. *Higley* v. *Michigan Department of Corrections*, 835 F.2d 623 (CA 6, 1987), citing *Hawkins* v. *Justin*, 109 Mich App 743 (1981). The court below erred by finding Michigan's imprisonment tolling law to be inconsistent with the policies embodied in section 1983.

The central objective of the Reconstruction-Era Civil Rights laws is to provide compensatory relief to those deprived of their federal rights by state actors. *Felder* v. *Casey*, 486 US ___, 108 S Ct 2302 (1988).

The Second, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits have approved of the application of state statutes of limitations' prisoner tolling provisions to section 1983 claims. The Sixth Circuit decision relied upon by the court below (*Higley* v. *Michigan Department of Corrections*, 835 F.2d 623 (CA 6, 1987)) appears to be alone among appellate courts in finding a state law which tolls the statute of limitations for prisoners inconsistent with the purposes of section 1983.

The remedial goals of section 1983 are safeguarded and advanced by an imprisonment tolling law. Michigan's tolling statute is consistent with the Constitution and laws of the United States and it should be applied.

ARGUMENT

I. INTRODUCTION

The issue to be decided by this Court is whether the Michigan statute of limitations' imprisonment tolling provision must be applied to an inmate's civil rights claim filed under 42 USC Section 1983. Petitioner contends that state tolling law must be applied in light of this Court's holdings in *Wilson* v. *Garcia*, 471 US 261 (1985), and *Board of Regents* v. *Tomanio*, 446 US 478 (1980).

II. HISTORY AND PURPOSE OF TOLLING STATUTES

A. There Is Significant Historical Support For Tolling And Disability Provisions

Provisions tolling actions accruing during disabilities such as infancy, insanity and incarceration, have been

codified in nearly every state.[1] Similar provisions toll limitation periods for absence from a state, fraudulent concealment of a cause of action or absence during war time.[2] These tolling provisions are generally derived from the common law. The rule in respect to maintenance of actions by prisoners derives from the common law doctrine that a convicted felon was *civiliter mortuus* (civilly dead). See *Heard* v. *Caldwell*, 364 F.Supp. 419 (SD Ga 1973).

B. Michigan's Disability Tolling Statute.

Michigan has a statute which tolls the time for filing a suit under certain circumstances. In pertinent part, the statute provides:

> If the person first entitled to make an entry or bring an action is under 18 years of age, insane, or imprisoned at the time the claim accrues, the person or those claiming under the person has 1 YEAR after the disability is removed through death or otherwise to make the entry or bring the action, although the period of limitation has run. (MCLA 600.5851; MSA 27A 5851(1).)

Michigan first codified the predecessor to today's disability statute for prisoners in 1846.[3] Those whose action accrued while in prison were given five years after their release to start the suit.

---

[1] See 54 C.J.S. Sections 115, 116, 51 AmJur 2d Section 178 et seq. Federal tolling provisions have been adopted for use in cases where the statute of limitations is established by federal law, e.g. 28 USC Section 2401 (suits against the U.S.); 28 USC Section 2416 (suits by the U.S.). See also *Johnson* v. *Railway Express Agency*, 421 US 454, 466 (1974).

[2] See e.g. MCLA 600.5853, 5855, 5854.

[3] Section 5 of R.S. 1846, Chapter 139.

The Michigan legislature recognized in 1972 that circumstances for prisoners had changed and that a five year period was no longer required. As a consequence, the time for bringing an action after removal of the disability was shortened from five years to one year. Since 1972, the disability tolling statute has been reviewed by the Michigan legislature, most recently in 1986. *Higley* v. *Michigan Department of Corrections*, 835 F.2d 623, 625 (CA 6, 1987).

In addition to its recent affirmation by the Michigan legislature, the tolling statute has been reviewed and upheld by Michigan courts. See *Higley*, 835 F.2d 625.

In *Hawkins* v. *Justin*, 109 Mich App 743, 311 NW 2d (1981), the Michigan imprisonment tolling statute was challenged as a denial of equal protection. The appellate court rejected the lower court's finding that the tolling provision was unconstitutional. In its analysis, the appellate panel examined the governmental interest underlying the statute by looking at the legislative history. The court cited with approval the 1972 Michigan legislative committee comment concerning the disability provision:

> "Section 5851 is based on Sections 609.5, 609.6 and 609.15 of CL 1948. However, the present law is changed substantially. The period in which an action can be brought after a disability has been removed has been reduced from the present five years for real actions, and the present period of original limitation in personal actions, to one year for all actions. At the present time infants and insane persons are able to bring actions through their guardians and even prisoners can bring civil actions, though they may not be allowed to be personally present, so it is not as necessary to provide long periods after the removal of the disability in which to sue as it was in the past when these disabilities were considerably more real. Nev-

> ertheless, it was considered better to allow a short period after the termination of the disability in which the person under the disability could bring an action."

109 Mich App at 748.

The court concluded that "[t]here is no question that the Legislature had the power to enact this statute and determine the conditions under which a right may accrue . . . 109 Mi App at 747. The court rejected the argument that the statute was outdated and could be ignored.

> Defendant correctly argues that prisoners today are generally less isolated and less restricted than they were historically * * * The Legislature still could have determined rationally that prisoners are more restricted than ordinary citizens and thus in need of the special protection afforded by the statute. The Legislature reasonably could have found that, notwithstanding the ability of prisoners to obtain legal counsel and have access to the judicial process, they still have restraints imposed by their confinement which places them at a disadvantage compared to ordinary citizens.
>
> 109 Mich App 747-48

In sum, Michigan courts have correctly recognized that the establishment of limitations statutes is properly a legislative decision.

C. Recent Federal Court Findings That Michigan Does Not Provide Prison Inmates With Meaningful Access To The Courts Makes The Imprisonment Tolling Law Even More Important.

The legislative findings upon which MCL 600.5851 is based are buttressed by the recent factual findings of two separate federal courts concerning inmate access to the legal system.

In *Hadix* v. *Johnson*, 694 F.Supp 259 (ED Mich 1988), a class action, the court was called upon to determine whether a Michigan prison housing nearly 10,000 inmates was providing meaningful access to the courts as required by the U.S. Constitution, and *Bounds* v. *Smith* 430 US 817 (1977). The court concluded that it was not. Judge Feikens' findings, which were based upon in depth proofs taken over a three year period, included a determination that the law library system was inadequate and that inmates who are functionally or actually illiterate, indigent or in segregated confinement are unable to use the library system to gain meaningful access to the courts. The decision also held that legal assistance available is not sufficient and does not constitute meaningful access to the courts. 694 F.Supp at 286.

Evidence admitted in the *Hadix* case showed that between twenty and fifty percent of the inmate population was unable to use any law library materials because of actual or functional illiteracy. The average reading level was determined to be grade six to grade six and one half. 694 F.Supp at 269-70.

Knop v. *Johnson*, 667 F.Supp. 467 (W.D. MI 1987) was a federal class action concerning conditions at four Michigan Department of Corrections institutions. In *Knop*, the district court held that inadequate law library policies violate the inmates' right of access to courts such that the system violates constitutional guarantees. According to the *Knop* court, "the main law libraries do not contain certain materials that an inmate needs to file a meaningful complaint." 667 F.Supp at 495.

In light of these recent federal court findings that Michigan inmates are denied meaningful access to the courts, state law tolling provisions for prisoners take on greater

significance. It is not inconsistent with federal law to safeguard a prisoner's cause of action until he is out of the institution and better able to gain access to the courts.

The facts found generally applicable to Michigan prisoners by the Michigan legislature and two federal courts in Michigan are specifically true as to petitioner Hardin based on the record in this case.

Mr. Hardin's cause of action accrued while he was in the Reception Center at the State Prison of Southern Michigan, the institution found constitutionally deficient in *Hadix, supra*. During his stay at the State Prison of Southern Michigan, he was held in detention. J.A. at 7. Petitioner Hardin indicated in his Motion for Appointment of Counsel filed with this Court that he can only gain access to the prison library on a limited basis, and that the law materials contained in that library are very limited. In his complaint, Petitioner stated that he had no legal knowledge, and that he had to pay prison writ-writers in order to bring his case. Mr. Hardin did not complete high school, but was able to earn a General Education Diploma during his imprisonment. J.A. at 20. Petitioner's factual circumstances make application of the tolling provision both appropriate and necessary.

III. U.S. SUPREME COURT DECISIONS

A. This Court Has Consistently Found Tolling Provisions To Be Inseparable Components Of Statute Of Limitations Systems.

Section 1983 of the Civil Rights Act of 1871 created a federal remedy for citizens deprived of their constitutional rights under color of state law. A statute of limitations was not specified by the legislation. In *O'Sullivan* v. *Felix*, 233 U.S. 318 (1914), the United States Supreme Court approved the federal courts' practice of selecting

state statutes of limitations for claims brought under the Civil Rights Act, citing *McClaine* v. *Rankin*, 197 US 154 (1904). In *McClaine* this Court declared that "in the absence of any provision of the act of Congress creating the liability, fixing a limitation of time for commencing actions to enforce it, the statute of limitations of the particular state is applicable." 197 US at 158.

This federal practice of "borrowing" was formalized and incorporated into the text of 42 USC Section 1988. In *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), this Court held that 42 USC Section 1988 governed the source of procedural law for actions brought under the Civil Rights Act.[4]

In *Wilson* v. *Garcia*, 471 US (1985), this Court interpreted 42 USC Section 1988 to require a three step inquiry in selecting the appropriate statute of limitations:

> "First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.' . . . If no suitable federal rule exists, courts undertake the second step by considering application of

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[4] 42 USC Section 1988 states:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS', and of Title 'CRIMES', for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . .

> state 'common law, as modified and changed by the constitution and statutes' of the forum state. *Ibid.* A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.'

421 US at 267, quoting *Burnett* v. *Grattan*, 468 US 42, 47-48 (1984). *Wilson* "principally involve[d] the second step in the process: the selection of 'the most appropriate' or 'the most analogous' state statute . . ." 471 US at 268 (footnotes omitted). *Wilson* held that a single statute must be selected for each state, 471 US at 275, and further held that the most appropriate statute was that applicable to "the tort action for the recovery of damages for personal injuries", 471 US 276.

Wilson, while making a federal court consider and apply of the 'most analogous state statute', recognizes that:

> the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law.

471 US at 269. This recognition confirms a series of recent decisions of this Court.

In *Johnson* v. *Railway Express Agency*, 421 US 454 (1974), this Court held that "since there is no specifically stated or otherwise relevant federal statute of limitations for a cause of action under Section 1981, the controlling period would ordinarily be the most appropriate one provided by state law" (citations omitted). 421 US at 462. The *Johnson* Court went on to conclude that tolling provisions must also be applied:

> In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and

> questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.
>
> 421 US at 464.

In *Board of Regents* v. *Tomanio*, 446 US 478 (1980), this Court reiterated its commitment to apply state statutes of limitations and tolling laws to actions brought under the Civil Rights Act, unless the state law was found to be inconsistent with the federal constitution or federal law. As a result, this Court applied New York statute of limitations and interdependent tolling rules, stating: "We believe that the application of the New York law of tolling is in fact more consistent with the policies of federalism invoked by the Court of Appeals than a rule which displaces the state rule in favor of an ad hoc federal rule" (446 US at 491-92). The *Tomanio* Court noted that in most cases involving a limitation period for a federal statute, the federal courts are faced with a choice between state law and the creation of federal law that is inherently arbitrary.

> In Section 1983 actions, however, a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases, they are binding rules of law.
>
> 446 US at 484.

In *Tomanio* this Court was unwilling to judicially revise the rule selected by the New York legislature, 446 US at 491-92.

In *Chardon* v. *Fumero Soto*, 462 US 650 (1983), this Court continued its policy of uniformly accepting and applying state tolling provisions. *Chardon* involved a Sec-

tion 1983 class action against Puerto Rican education officials. The class certification effort failed because the class was not sufficiently numerous. Individual actions were then consolidated. Respondents moved to dismiss petitioners' complaints as time barred; the lower courts rejected the defendants statute of limitations arguments. This court held that the tolling provisions of Puerto Rican law applied.

> "Because the chronological length of the limitation period is interrelated with provisions regarding tolling, we reasoned that the practice of borrowing state statutes of limitations logically includes rules of tolling."

462 US at 657.

See also *Robertson* v. *Wegmann*, 436 US 584 (1978), which upheld and applied a Louisiana statute which had the effect of abating a 1983 action upon the death of the petitioner.

These cases establish that it is neither possible nor practical to view statutes of limitations in a vacuum. The body of statutory laws of tolling, revival and disability are all interrelated. As this Court pointed out in *Johnson* v. *Railway Express Agency, supra:*

> Any period of limitation is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interest in favor of protecting valid claims are outweighed by the interest in prohibiting the prosecution of stale ones.

421 US at 463-64.

In summary, this Court has consistently recognized that state statutes of limitations apply in 1983 actions and that state tolling provisions are, of necessity, an integral part of those statutes.

B. Application Of State Statute Of Limitations' Tolling Provisions Is Not "Inconsistent With The Constitution And Laws Of The United States."

The issue in this case is narrow. There is no dispute that MCL 600.5805(8) provides a three year statute of limitations which is generally applicable to actions brought under 42 USC Section 1983. There is no dispute that Mr. Hardin's suit was filed beyond this limitation period.[5] There is no dispute that Michigan courts would apply MCL 600.5851 to toll the statute of limitations as to Mr. Hardin. *Hawkins* v. *Justin*, *supra*; *Higley*, 623 F.2d at 625. It is further beyond dispute that a federal court must apply the state tolling law in favor of Mr. Hardin unless it finds the tolling statute "not consistent with the constitution and laws of the United States," 42 USC 1988; *Tomanio*, *supra*; *Chardon* v. *Fumero Soto*, *supra*.

The issue then is whether the Michigan disability tolling statute is inconsistent with 42 USC 1983.

The central objective of the Reconstruction-Era civil rights statutes is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief. *Burnett* v. *Grattan*, 468 US at 55. *See also: Mitchum* v. *Foster*, 407 US 225, 239, (1972); *Griffin* v. *Breckenridge*, 403 US 88,

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[5] Mr. Hardin's cause of action accrued no earlier than October 24, 1980, his first day of administrative segregation at State Prison of Southern Michigan and no later than July 15, 1981, the last day of his continuing segregation. This action was filed on December 24, 1985.

(1971); *McNeese* v. *Board of Education*, 373 US 668, 671-72, (1963); *Monroe* v. *Pape*, 365 US 167, 173, (1961).

Michigan's tolling provision is not inconsistent with the primary purpose of the Civil Rights Act. In fact, the remedial goals of the statute are furthered by an imprisonment tolling rule. The effect of the rule is to safeguard the prisoner's constitutional rights in recognition of restricted access to the judicial system due to confinement.

This Court has recognized that "[l]itigating a civil rights claim requires considerable preparation. An injured person must recognize the constitutional dimensions of his injury. He must obtain counsel or prepare to proceed *pro se*." *Burnett* v. *Grattan*, 468 US at 50. Modern reality shows that prisoners access to attorneys is far from adequate. That fact was acknowledged in *Johnson* v. *Avery*, 393 US 483 (1969):

> While the demand for legal counsel in prison is heavy, the supply is light. For private matters of a civil nature, legal counsel for the indigent in prison is almost non-existent.
>
> 393 US at 493.
>
> (concurrence by Douglas, J.)

Assuming that self help is the only practical way for many prisoners to gain access to the courts, a question concerning legal competence must be posed. It is not realistic to assume that a prisoner will recognize the often subtle constitutional nature of his injury and be qualified to prepare necessary legal pleadings. This Court observed in *Johnson* v. *Avery*, *supra*, that "Jails and prisons include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intel-

ligence is limited." 393 US at 487. In a different but related context, this Court declared that "the recognition by this Court that prisoners have certain constitutional rights would be diluted if inmates, often totally or functionally illiterate, were unable to articulate their complaints to the courts." *Wolff* v. *McDonnell*, 418 US 539, 579 (1974). The observations that this Court has made on the difficulty of prisoner access are reinforced and amplified by the factual findings of the federal courts concerning access in Michigan. See *Hadix* v. *Johnson*, *supra;* and *Knop* v. *Johnson*, *supra*.

It is consistent with the goals of section 1983 to safeguard a prisoner's constitutional protections with a tolling statute. Those who cannot plead their cause because of illiteracy or because competent counsel cannot be found are protected.

This Court has also recognized that respect for state legislative action promotes the goal of federalism, *Tomanio*, 446 US at 491. Under settled section 1983 law:

> federal law incorporates the state's judgment on the proper balance between the policies of repose and the substantive policies of enforcement. . .
>
> *Wilson* v. *Garcia*, 471 US at 271.

In other words, the judgment as to "the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones" (*Wilson* v. *Garcia*, 471 US at 271 quoting *Johnson* v. *Railway Express Agency, Inc.*, *supra*, 421 US 454 at 463-64) is a judgment that has been left to the states. The general value of repose, which is the purpose of all statutes of limitation, while recognized in federal law, see *Wilson* v. *Garcia*, 471 US at 271, is not a specific

objective of 42 USC Section 1983 or Section 1988. See *Burnett* v. *Grattan*, 468 US 42 at 54 (1984).

Counsel is aware of two cases in which this Court has invalidated state statutes that time limit actions on the grounds that these statutes were "inconsistent with . . . the laws of the United States" under 42 USC Section 1988.

In *Felder* v. *Casey*, 486 US ___, 108 S Ct 2302 (1988), this Court reconfirmed its view that the central aim of section 1983 is to provide compensatory relief to those deprived of their federal rights by state action. (486 US at ___, 108 S. Ct. at 2305.) As a consequence, the Wisconsin statute which required notice of a claim to be made before instituting suit was found to be inconsistent with federal law.

> In enacting Section 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law.
>
> *Felder* v. *Casey*, 486 US at ___, 108 S.Ct. at 2308.

In contrast, a state law such as Michigan's imprisonment tolling statute shields and protects the prisoner's constitutional rights and furthers the remedial goals of the federal civil rights law.

Felder v. *Casey* was not the first case where a state limitation was found to be inconsistent with the goals of Section 1983. In *Burnett* v. *Grattan*, 468 US 42 (1984), a six month limitation period was borrowed from a Mary-

land statute and applied by a federal district court to time-bar a Section 1983 action. The Court of Appeals for the Fourth Circuit reversed the application of the short limitation period and this Court affirmed. The defendants in *Burnett* argued that prompt assertion and resolution of complaints was an important policy goal of the abbreviated limitation period in Maryland. This Court rejected that argument, declaring:

> That policy, keyed to a classification of Plaintiffs cannot pre-empt the broadly remedial purposes of the Civil Rights Act.
>
> 468 US at 54.

Defendants also forwarded an argument in *Burnett* that a short limitations period affords public officers protection from a seemingly endless stream of unfounded and often stale lawsuits brought against them. In response to this point the Court said:

> This contention undercuts rather than buttresses the case for applying the limitations period embodied in Art 49B to federal civil rights actions. The statement suggests that the legislative choice of a restrictive 6-month limitations period reflects in part a judgment that factors such as minimizing the diversion of state officials' attention from their duties outweigh the interest in providing employees ready access to a forum to resolve valid claims. That policy is manifestly inconsistent with the central objective of the Reconstruction-Era civil rights statutes, which is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.
>
> 468 US at 54, 55.

In summary, this Court has reviewed the applicability of specific state limitations, statutes to civil rights actions

on five occasions since 1980. *Tomanio, supra; Chardon* v. *Fumero Soto, supra; Burnett* v. *Grattan, supra; Wilson* v. *Garcia, supra;* and *Felder* v. *Casey, supra.* These cases establish that state statutes of limitations, including their interrelated tolling provisions, apply unless the state statutes interfere with or unduly burden assertion of the federal civil rights claim.

IV. THE LOWER COURT DECISION REFUSING TO APPLY MICHIGAN'S IMPRISONMENT TOLLING STATUTE WAS CLEARLY ERRONEOUS

Both the district court and the appellate court below dismissed Mr. Hardin's complaint *sua sponte*, without any record and without an appearance by the State. The Sixth Circuit panel rejected petitioner's argument that Michigan's imprisonment tolling statute should be applied, relying entirely on *Higley* v. *Michigan Department of Corrections*, 835 F.2d 623 (CA 6, 1987). The reasoning of *Higley* is unpersuasive and it should be overruled.

A. The Sixth Circuit Decision In *Higley* Is Erroneous.

Higley involved a *pro se* suit filed by a Michigan prisoner who claimed a violation of his eighth and fourteenth amendment rights. The suit was filed approximately three years and five weeks after the occurrence giving rise to the action. The district court dismissed the suit as time barred by Michigan's three year statute of limitations. The Sixth Circuit affirmed the dismissal and refused to apply the imprisonment tolling provision of MCL 600.5851. The *Higley* panel recognized that courts are generally obligated to apply state tolling statutes to section 1983 actions, and conceded that Michigan courts would apply the tolling statutes to inmates under *Hawkins* v. *Justin, supra.* However, the *Higley* court held that application of the tolling provision to a prisoner

1983 action would be "inconsistent with the policies embodied in Section 1983." 835 F.2d at 624, 627.

Higley begins by acknowledging that the primary purposes underlying 42 USC Section 1983 are "the compensation of prisoners whose federal rights have been violated as well as the prevention of an abuse of power by those acting under color of law." 835 F.2d at 625; see also *Burnett* v. *Grattan*, 468 US at 54. The *Higley* court recognizes that the primary goal of Section 1983 is furthered by MCL 600.5851, 835 F.2d at 626.

However, the *Higley* court then suggests three alternate purposes of section 1983 and asserts that the Michigan tolling statute conflicts with each of them. First, the court suggests that the tolling statute is inconsistent with the "sound federal policy in attempting to deal with section 1983 claims as promptly as possible." 835 F.2d at 627.

The theory that section 1983 claims must be resolved promptly is not rooted in the large body of section 1983 case law. As *Burnett* v. *Grattan*, *supra*, points out, the policies of prompt notice and repose further state goals, not the broadly remedial purposes of Section 1983. Indeed, an overly restrictive promptness policy "is manifestly inconsistent with the central objective of the Reconstruction-Era and rights statute". 468 US at 55. No overriding policy of "attempting to deal with section 1983 claims as promptly as possible" can honestly be read into the act.

Second, the court suggests that section 1983's purpose is to serve "a rehabilitative function by providing a 'safety value' for prisoner grievances."[6] 835 F.2d at 626. Peti-

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[6] The court adopts this purpose from the district court in *Vargas* v.

tioner respectfully suggests that the *Higley* court's characterization of the purpose of section 1983 is a cynical betrayal of the broad remedial purposes of the statute and one which has no support in the decisions of this Court. Section 1983 is a remedial statute for violations of the most serious character. Providing a forum to vindicate constitutional deprivations is not done to humor litigants or to engender respect for the law in prisoners. The purpose of section 1983 is not simply to provide a safety valve for disgruntled inmates who might otherwise act out. The civil rights statutes are intended to create real protections of constitutional rights. It is not rehabilitation but compensation for the wrong that is at stake in a section 1983 damages action.

Third, the *Higley* court recognizes that deterrence of future illegal conduct is a goal of section 1983. The court then concludes that, because of the need for a prompt resolution to effect deterrence, the goal of deterrence is undermined by the Michigan tolling statute.

Deterrence of future misconduct certainly is an attribute of the civil rights act. Yet, it does not follow, as *Higley* would suggest, that delay undermines deterrence. If it is the offending officer alone who is to be deterred, it seems that a lengthy period to bring an action would have

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Jago, 636 F.Supp 425 (S.D. Ohio, 1986):

> It has long been this Court's opinion that the filing of section 1983 suits by prisoners serves a rehabilitative function, acting as a "safety valve", as it were, to relieve some of the tremendous pressure that builds in any captor/captive situation. By giving due consideration to the suits filed in which deprivations of civil rights are alleged, we hope to engender in those convicted and imprisoned a sense of respect for the law, not an easy task given the jaundiced eye with which most prisoners observe those in legal authority.
>
> 636 F.Supp at 429.

a stronger not weaker deterrent effect. If the goal is to deter others from similar unconstitutional conduct, it is best served by making an example out of the constitutional tort feasor. In such a situation the deterrence is widespread, not confined to one offending guard. Presumably, in a prison setting, the greatest deterrence takes place every time a victim prevails in court.

Under MCL 600.5805(8), a Michigan inmate has three years from the date that the section 1983 cause accrues to file suit. *Higley*, 835 F.2d 624, citing *Wilson* v. *Garcia*, *supra*. With normal docket delays, a section 1983 suit may not come to judgment until four years or more after accrual of the cause. Certainly, Michigan's three year statute is not inconsistent with the deterrent purposes of section 1983, *Wilson* v. *Garcia*, *supra*, and certainly the "judgment on the proper balance between the policies of repose and . . . enforcement" is a decision for the state legislature, not the federal court. *Wilson* v. *Garcia*, 471 US 271.

The *Higley* court bases its decision on two district court decisions, *Perotti* v. *Carty*, 647 F.Supp 39 (SD Ohio 1986) and *Campbell* v. *Guy*, 520 F.Supp 53 (ED Mich 1981), aff'd 711 F.2d 1055 (CA 6, 1983), cert. den. 464 US 1051. Both cases apply prisoner tolling statutes on a case by case basis and permit the conclusion that "as appellant's filing of suit in district court shows, he is in fact not legally disabled." 833 F.2d at 626.

There is, of course, an unavoidable circularity to the court's logic. Every inmate who files a suit in federal court shows that *he* has access to the court.

Presumably, the Michigan legislature passed the tolling statute because of a belief that many inmates were subject to restrictions on their access to the legal system. As this

Court has recognized: "The drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making necessary classifications is neither possible nor necessary." *Massachusetts Bd. of Retirement* v. *Murgia*, 427 US 307, 314 (1976). Indeed our federal system survives due to judicial restraint in recognizing that "even improvident decisions will eventually be rectified by the democratic process." *Vance* v. *Bradley*, 440 US 93, 97 (1979). Moreover, the "case by case" interpretation of MCL 600.5851 endorsed by the *Higley* court had been proposed to and specifically rejected by the Michigan Court of Appeals in *Hawkins*. 109 Mich at 749.

In the final analysis, the *Higley* decision rests on the court's belief that:

> There is no logical basis for applying a tolling period to encourage stale claims in the face of such ready availability of a federal forum to hear and to consider these claims.
>
> 833 F2d at 626.

Simply stated, the *Higley* court disagrees with the Michigan legislature in its conclusion that inmates' access to the courts is to some extent restricted due to their imprisonment. 109 Mich App 747-748. The prior decisions of this Court demonstrate that the lower court cannot impose its policy judgments concerning a state tolling law on a state. *Tomanio, supra; Chardon* v. *Fumero Soto, supra.*[7]

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[7] The civil rights act could be amended so that a uniform federal statute of limitations were imposed or, perhaps, so that state tolling provisions would not be applicable. However, this power is reserved for the Congress. See *Miller* v. *Smith*, 615 F.2d 1037, 1044 (CA 5, 1980).

B. Tolling Statutes In Other Circuits

A number of federal circuits have had the opportunity to review the applicability of state prisoner disability tolling statutes in section 1983 actions. While several circuit courts have been troubled by the issue, the majority of the circuits recognize that *Wilson* v. *Garcia*, *Tomanio*, and *Fumero Soto*, require federal courts to apply state tolling statutes.

The *Higley* decision pointed out two Ninth Circuit cases that had analyzed the prisoner tolling issue quite fully, 835 F.2d at 624, citing *May* v. *Economoto*, 633 F.2d 164 (CA 9, 1980), and *Major* v. *Arizona*, 642 F.2d 311 (CA 9 1981). *May* found the California state tolling provisions to be applicable to section 1983 claims, following *Ney* v. *State of California*, 439 F.2d 1285 (CA 9 1971). *Major* found Arizona's tolling statute not applicable, but on a different ground than that relied on by the *Higley* court. The *Major* court, interpreting Arizona law, held that the Arizona prisoner tolling statute would not be enforced by Arizona courts. 642 F.2d at 315.

The *Major* decision was overruled three years later after the Ninth Circuit reconsidered the statute in light of an Arizona appellate court decision, *Smith* v. *MacDougall*, 676 P2d 656 (Ariz App 1983), which found the prisoner tolling law to be valid under Arizona law. *Stephan* v. *Dowdle*, 733 F.2d 642 (CA 9 1984). While the result reached in the *Major* case was wrong, it correctly observed that federal courts must pay heed to a state court's view of its own laws. The *Major* panel stated that:

> A state legislative enactment is not to be literally or mechanically applied by federal courts. Rather, a federal court charged with the application of state law must enlist aid and guidance provided by that

> state's courts whose responsibility it is in the first place to interpret and construe the statute.
>
> (citations omitted) 642 F.2d at 313.

In a strong dissent to *Major*, Circuit Judge Alarcon complained that the mandate of *Board of Regents* v. *Tomanio*, 446 US 478 (1980), to apply state tolling law unless inconsistent with the federal constitution or statutes was being ignored and that the majority should not "be boldly charting new paths in unexplored legal territory." 642 F.2d at 315-16.

In the Seventh Circuit, an Indiana prisoner tolling provision was considered in light of *Tomanio*, *supra*, and it was found to be applicable. *Bailey* v. *Faulkner*, 765 F.2d 102 (CA 7, 1985). Judge Posner, writing for the panel, recognized that a tolling statute could be disregarded if it produced results inconsistent with the policies of section 1983, but concluded:

> we cannot say that a provision that gives a prisoner more time than he would otherwise have (or deserve) in which to bring a suit under that section would be inconsistent with the policies of section 1983.
>
> 765 F.2d at 104

In his discussion, Judge Posner pointed out that the Seventh Circuit had already approved the application of an Illinois prisoner disability statute in *Duncan* v. *Nelson*, 466 F.2d 939 (CA 7 1972), and that the *Tomanio* decision placed the correctness of *Duncan* v. *Nelson*, beyond question. 765 F.2d at 104.

The Second Circuit Court of Appeals reached the same result in *Ortiz* v. *LaVallee*, 442 F.2d 912 (CA 2, 1971). In facts quite similar to the instant case, the prisoner's *pro se* complaint was dismissed by the district court without a

hearing, based on the ground that it was time barred by New York's applicable three year statute of limitations. The prisoner appealed, claiming that the New York tolling provision for imprisonment should have been applied and the Second Circuit agreed. The panel looked at the legislative advisory committee report for guidance and concluded that the intent was to have the tolling provision apply. The continued vitality of *Ortiz* was recognized by another panel looking at the New York tolling law in *Kaiser* v. *Cahn*, 510 F.2d 282 (CA 2, 1974). *Ortiz* correctly noted that the disability provision was motivated by a recognition of the practical as well as the legal difficulties prisoners face in instituting and prosecuting suits. 442 F.2d at 914.

In *Hughes* v. *Sheriff of Fall River County Jail*, 814 F.2d 532 (CA 8, 1987), the court faced a South Dakota statute which tolled the statute of limitations for prisoners on all claims except federal civil rights claims. See 814 F.2d at 533, quoting the statute. The prisoner argued that the exemption for civil rights claims was inconsistent with federal law. The *Hughes* panel found that the South Dakota law discriminated against federal rights by singling out federal civil rights claims for exclusion from the tolling law and was therefore inconsistent with the policies of 42 USC 1983. 814 F.2d at 534-35. The *Hughes* decision is consistent with petitioner's approach in the case at bar and this Court's decisions in *Burnett* v. *Grattan*, *supra*, and *Felder* v. *Casey*, *supra*.

In Miller v. *Smith*, 615 F.2d 1037 (CA 5, 1980) the Fifth Circuit adopted a case by case application of the Texas prisoner tolling statute. The court held that the prisoner should be entitled to invoke tolling only "as to any period while he was in prison and before access to the federal courts was freely available to state prisoners." 615 F.2d at

1042. The *Miller* decision contained a dissent where Judge Kravitch questioned the authority of a federal court to alter a state statute by imposing its own condition precedent. In his opinion, he characterized the majority as encroaching upon the legislative and judicial functions of the state, pointing out that the Texas legislature had modified and reaffirmed the provision and that the Texas appellate court had expressly approved it. Finally, the dissent said:

> Although I concede that the historical need for tolling during imprisonment has diminished in recent years (citation omitted) . . . whether it has diminished sufficiently for the provision to be discarded is for the State of Texas to determine.
>
> 615 F.2d at 1044.

Miller v. *Smith* was decided shortly before this Court decided the *Tomanio* case. Upon receipt of *Tomanio*, the *Miller* panel reconsidered and overruled *Miller I* in *Miller* v. *Smith*, 625 F.2d 144 (CA 5 1980).

The Tenth Circuit Court of Appeals in *Brown* v. *Bigger*, 622 F.2d 1025 (CA 10, 1980), rejected a district judge's ruling which dismissed an inmate's section 1983 suit as untimely filed under the Kansas statute of limitations. The *Brown* court found the Kansas imprisonment tolling statute to require tolling by its plain language and noted that two Kansas courts, *Domann* v. *Pence*, 183 Kan 196, 326 P2d 260 (1958); *State* v. *Calhoun*, 50 Kan 523, 32 P 38 (1893), had adopted a literal interpretation of the state tolling statute.

The Eleventh Circuit has adopted a somewhat different approach to the evaluation of the validity of state prisoner tolling statutes. *Turner* v. *Evans*, 721 F.2d 341 (CA 11, 1983); *Whitson* v. *Baker*, 755 F.2d 1406 (CA 11, 1985).

Both decisions recognize that state tolling laws apply to section 1983 actions to the same extent that the state itself would apply the tolling provision. Both Eleventh Circuit panels therefore certified the state law issue to the appropriate state supreme court. In *Turner*, the Georgia Supreme Court informed the circuit court that:

> Even though the reasons for tolling . . . may have disappeared . . . the tolling provision . . . for prisoners is still valid law, with the authority to repeal it residing solely with the legislature.
>
> 721 F.2d at 342.

In *Whitson*, the Alabama court held that the prisoner tolling statute was still valid law in that state, 755 F.2d at 1409, but the Plaintiff Whitson, as a pretrial detainee, was not within the class of persons protected by that statute. 755 F.2d at 1410.

The Sixth Circuit's blind adherence to *Higley* in the case at bar suggests that *Higley* is the only statement on this issue in the Sixth Circuit. This inference is incorrect. The court's discussion in *Mulligan* v. *Schlacter*, 389 F.2d 231 (CA 6, 1968) and *Williams* v. *Hollins*, 428 F.2d 1221 (CA 6, 1970) suggest that the circuit was aware of and would apply state tolling law in 1983 cases. *Mulligan* held the statute inapplicable based on a finding that the action accrued before the petitioner's incarceration. 389 F.2d at 233. *Williams* held that the Tennessee statute of limitations was not tolled because, unlike Michigan, there was no prisoner disability tolling law.

In *Austin* v. *Brammer*, 555 F.2d 142 (CA 6, 1977) the Sixth Circuit reversed and remanded a dismissal of an inmate's section 1983 complaint because the district court had not considered the applicability of the Ohio prisoner's tolling statute. 555 F.2d 144. If the *Austin* panel were of

the opinion that the Ohio tolling statute was inconsistent with section 1983, it would not have squandered judicial resources by remanding the case for a fruitless hearing. See also *Covington* v. *Winger*, 562 F.Supp 115 (WD Mich 1983), aff'd 746 F.2d 1475 (CA 6, 1984), cert. den. 470 US 1056 (1985); *Kurzawa* v. *Mueller*, 545 F.Supp 1254 (ED Mich 1982), aff'd 732 F.2d 1456 (CA 6, 1984).

In summary, the majority of Circuits considering the problem of the applicability of state prisoner tolling statutes to section 1983 claims have properly recognized that federal courts should apply these statutes, as the state would apply them, to these claims. *Wilson* v. *Garcia*, *supra; Tomanio supra; Chardon* v. *Fumero Soto*, *supra*. *Higley's* reasoning is inconsistent with the rationale of this Court's decisions in these cases and with the result reached by the majority of the circuit courts addressing the issue.

RELIEF

For the reasons set forth, petitioner requests that the decision of the Court of Appeals for the Sixth Circuit be reversed and that this action be remanded to the district court for trial.

Respectfully submitted,

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RESPONDENT'S

BRIEF

(6)

No. 87-7023

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

TYRONE VICTOR HARDIN,

Petitioner,

v.

DENNIS STRAUB,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT

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52 pp

QUESTION PRESENTED

Whether Michigan's open-ended tolling statute, MCL 600.5851(1), when applied to § 1983 claims by prisoners against prison personnel which accrued during imprisonment, is inconsistent with the policies embodied in 42 USC § 1983.

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STATUTORY PROVISIONS INVOLVED

42 USC Sec. 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC Sec. 1988:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS", and of Title 'CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause ...

MCL 600.5805(1):

> A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

MCL 600.5805(8):

> The period of limitations is 3 years after the time of death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

MCL 600.5851(1):

> Except as otherwise provided in subsection (7), if the person first entitled to make an entry or bring an action is under 18 years of age, insane, or imprisoned at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852.

STATEMENT OF THE CASE

Respondent Dennis Straub was never served with Petitioner's complaint and did not participate in either the District Court or the Sixth Circuit Court of Appeals proceedings in this matter. The relevant facts as may be gleaned from the District Court and Court of Appeals files are as follows:

Petitioner Tyrone Victor Hardin claims he was moved from Kent County Jail to Southern Michigan Prison on October 24, 1980 where he was taken to the Reception and Guidance Center and placed in administrative segregation. In January of 1981, he alleges he was placed in a detention cell until March, 1981, when he was returned to Kent County for trial. On May 14, 1981, Petitioner claims he was returned to the state

prison system and again placed in administrative segregation. On July 15, 1981, Petitioner claims he was transferred to Marquette State Prison. J. App. p 8.

Petitioner claims that he was denied an opportunity for a hearing before he was placed in administrative segregation in violation of 1979 AC, R 791.3315. J. App. p 7. Petitioner further claims that he was unaware that his being placed in administrative segregation violated his civil rights until he received a Michigan Department of Corrections rule book in July of 1984. He further claims that it was not until September of 1985 when he obtained his classification report that he learned that his being placed in administrative segregation

might conflict with the rules. (Petition for Certiorari, p 4).

On December 24, 1985, Petitioner filed a 42 USC § 1983 complaint, on a form provided by the Michigan Department of Corrections, in the United States District Court for the Eastern District of Michigan claiming that his administrative confinement in 1980 and 1981 violated his civil rights. J. App. p 2. The District Court sua sponte reviewed the complaint and on February 26, 1986 dismissed it holding that Michigan's three-year statute of limitations, MCL 600.5805, barred Petitioner's action. J. App. p 26. Petitioner filed a motion to vacate the dismissal which was denied on May 21, 1987, as untimely. J. App. p 33.

On appeal to the Sixth Circuit Court of Appeals the District Court decision was affirmed without oral argument. The Sixth Circuit based its decision on Higley v Michigan Department of Corrections, 835 F2d 623 (CA 6, 1987), which held that Michigan's tolling statute, MCL 600.5851(1), was inconsistent with 42 USC § 1983 when applied to a claim by a prisoner against a prison official which accrued while the plaintiff was imprisoned.

A motion for rehearing en banc was denied on February 18, 1988. Petitioner timely filed a pro se petition for a writ of certiorari which was granted on October 11, 1988. The order granting the petition for writ of certiorari limited the question to be presented to the court

to the first question contained in the petition for certiorari. J. App. p 37.

SUMMARY OF ARGUMENT

Michigan's tolling statute, MCL 600.5851(1), provides that an individual with one of the named disabilities has one year after the disability is removed to file a complaint. The issue involved in Petitioner's complaint is whether Michigan's tolling provision, when applied to prison actions against prison personnel for claims which accrued during imprisonment, is inconsistent with 42 USC § 1983. It is acknowledged that 42 USC § 1988 allows federal courts to borrow state rules of decision not included within federal law, unless the state rule is inconsistent with the underlying federal objectives of § 1983. Board of Regents v Tomanio, 446 US 478 (1980).

Michigan's tolling statute, MCL 600.5851(1), is open-ended in that it has

no fixed term. The length of the tolling period where a prisoner is involved is dependent on the length of the sentence imposed by the sentencing court. In some cases, Michigan's tolling provision will allow a prisoner to maintain a § 1983 action against prison personnel decades after the conduct complained of has occurred.

The principal objectives of § 1983 are to prevent the abuse of power by those acting under color of state law (deterrence) and to compensate those whose federal rights have been violated (compensation) Robertson v Wegmann, 436 US 584 (1978). By allowing such lengthy and indeterminable delays, the statute as applied to prisoner actions against prison personnel for a claim which

accrues while imprisoned is inconsistent with the deterrent objective of 42 USC § 1983.

Since Bounds v Smith, 430 US 817 (1977) and Johnson v Avery, 393 US 483 (1969), prisoners are constitutionally guaranteed adequate access to the courts. The Sixth and the Eleventh Circuit Courts of Appeal have recognized that prisoners do indeed have access to the courts as evidenced by the number of § 1983 cases that have been filed. Higley v Michigan Department of Corrections, 835 F2d 623 (CA 6, 1987), Whitson v Baker, 755 F2d 1406 (CA 11, 1985).

While other circuit courts have usually found that the state tolling statutes do apply in § 1983 actions, they have failed to analyze their application

in terms of consistency with the objectives embodied in § 1983. The Sixth Circuit Court of Appeals in Higley did analyze Michigan's tolling statute using the standards provided in Tomanio. In using these standards the Sixth Circuit found that Michigan's tolling provision was inconsistent when applied to prisoner § 1983 claims against prison personnel which accrued during imprisonment. The Eighth Circuit, while finding South Dakota's statute of limitations, which provides a fixed maximum tolling period, consistent with § 1983, directly implied that if it were faced with an open-ended tolling statute such as Michigan's, it might find it inconsistent with § 1983.

Accepting Petitioner's argument that Michigan's open-ended tolling statute is

consistent with § 1983 will only encourage unnecessary litigation at the expense of the continued violation of prisoner civil rights. Whereas, accepting Respondent's position will help to deter further violations of prisoner civil rights without depriving those individuals whose rights have been violated from being compensated for their injuries.

I

THE APPLICATION OF MICHIGAN'S TOLLING PROVISION, MCL 600.5851(1), TO § 1983 ACTIONS COMMENCED BY PRISONERS AGAINST PRISON PERSONNEL FOR CLAIMS WHICH ACCRUE DURING IMPRISONMENT IS INCONSISTENT WITH THE POLICIES UNDERLYING 42 USC § 1983.

A. A three-step analysis must be undertaken before a state rule or statute may be borrowed for application to a § 1983 action.

Congress, in enacting 42 USC § 1983, did not provide all of the rules of decision necessary to adjudicate the claims. In enacting 42 USC § 1988, Congress endorsed the borrowing of those state rules of decision necessary to adjudicate claims under § 1983. Wilson v Garcia, 471 US 261 (1985), which dealt with the issue of which of two possible statutes of limitation applied to § 1983 claims, directed courts to follow a three-step process in determining whether

a state rule of decision was to be applied in § 1983 claims. The Court stated:

> "The language of § 1988, [footnote omitted] directs the courts to follow 'a three-step process' in determining the rules of decision applicable to civil rights claims:
>
> "'First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." [42 USC § 1988 [42 USCS § 1988].] If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum state. Ibid. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States." Ibid.' Burnett v Grattan, 468 US 42, 47-48, 82 L Ed 2d 36, 104 S Ct 2924 (1984)." 471 US 267.

No issues have been raised by Petitioner regarding the first two steps in the process. The sole question before

the Court involves the third step. Specifically, the narrow question in this case is whether Michigan's tolling statute, MCL 600.5851(1), when applied to a § 1983 claim of a prisoner against prison personnel which accrued while plaintiff was imprisoned, is inconsistent with the federal policies embodied in 42 USC § 1983.

B. Michigan's tolling statute, MCL 600.5851(1), as applied to prisoner claims which accrue during imprisonment, provides a period of time in which to file a claim that is dependent on the sentence of the prisoner.

Michigan's tolling statute, MCL 600.5851(1), provides:

> "Except as otherwise provided in subsection (7), if the person first entitled to make an entry or bring an action is under 18 years of age, insane, or imprisoned at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action

> although the period of limitations has run. This section does not lessen the time provided for in section 5852."

As applied to an imprisoned individual, the tolling provision is, in essence, open-ended because the extended tolling period in which an action must be filed is dependent on the sentence of the prisoner. Two prisoners whose civil rights are violated during the same event may have differing periods in which to file a claim. If one prisoner's sentence is five years and another's is 25 years, and they began their sentences on the same day and the event causing the violation occurred on that date, one prisoner would be required to file within six years of accrual, while the second prisoner would have 26 years to file if the express language of the statute is

applied. A prisoner's claim may lay dormant for decades, in the case of a prisoner serving 30 or 40 years, before it is legally necessary to file a complaint. Applying the express language of Michigan's tolling provision to Petitioner's § 1983 action would result in his complaint being timely.

C. It is the federal policies underlying § 1983 which must control whether a state rule of decision may be borrowed, not what the state legislature's purpose was in enacting the statute.

In determining whether Michigan's tolling statute may be borrowed for use in adjudicating a § 1983 claim, it must not only be consistent with the statute and federal constitutions, but also with the policies embodied in 42 USC § 1983. Robertson, in deciding whether to apply Louisiana law to abate a § 1983 claim

after the death of the plaintiff, identified two principal policies contained in § 1983. The Court held:

> "In resolving questions of inconsistency between state and federal law raised under § 1988, courts must look not only at particular federal statutes and constitutional provisions, but also at 'the policies expressed in [them]' [citations omitted] ... The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." 436 US at 590-591.

These policies have since been reaffirmed in other cases including Board of Regents v Tomanio, 446 US 478, 488 (1980), Burnett v Grattan, 468 US 42, 53 (1984), Felder v Casey, 487 US____, 108 S Ct 2302, 2307 (1988).

While it is true the Michigan legislature amended the tolling statute in 1972, its purpose in doing so is not

to be the exclusive basis for determining whether or not the statute should be borrowed in § 1983 actions by prisoners. It is the federal interest which is paramount, not the state purpose in enacting the tolling provision. As stated in Wilson:

> "...state law shall only apply 'so far as the same is not inconsistent with' federal law. This requirement emphasizes 'the predominance of the federal interest' in the borrowing process, taken as a whole. (Citation omitted)." 471 US at 269.

In Burnett, relating to whether to apply an administrative statute of limitation of six months to a § 1983 claim, it was held:

> "To the extent that particular state concerns are inconsistent with, or of marginal relevance to, the policies informing the Civil Rights Acts, the resulting statute of limitations may be inappropriate for civil rights claims. [footnote omitted]." 468 US 52.

A determination must be made based on federal interests not those of the state.

D. Application of Michigan's tolling statute to § 1983 claims of prisoners against prison personnel which accrued during imprisonment is inconsistent with the deterrent objective embodied in 42 USC § 1983.

Michigan's tolling statute on its face appears benign, but when applied to § 1983 prisoner actions, a more in-depth review reveals that its application is inconsistent with the deterrence objective of the Civil Rights Act. Petitioner's claim that Michigan's tolling provision furthers the goals of § 1983 is contrary to logic when applied to the objective of deterrence, given the open-ended nature of the statute.

The Sixth Circuit in Higley recognized that prompt resolution of § 1983 claims was necessary for the deterrent objective of the statute to be realized. Quoting with acceptance Vargas

v Jago, 636 F Supp 425 (SD Ohio, 1986), the Court concluded:

> "'We cannot help but believe that, in order to effect the rehabilitative purpose described above, as well as to deter prison officials from misconduct, quick resolution of disputes is vital. Promptness is even more important, we think, when a prisoner is complaining that his current incarcerators are violating, or have violated, his civil rights. To allow a prisoner one year after his release to bring his section 1983 suit neither would effect deterrence as to the alleged offender, nor rehabilitation as to the alleged victim.'" 835 F2d at 626.

It is acknowledged that prompt resolution of prisoner § 1983 claims cannot place an undue burden on the inmate by restricting the time in which to file a complaint to such a short time that the right to redress is illusory as was the situation in Felder and Burnett. In Felder, the Court found that a Wisconsin notice of claim statute

restricted plaintiff to such an extent the statute was inconsistent with the policies of § 1983. Similarly, the Court in Burnett found a six-month limitation period too restrictive and thus inconsistent with § 1983. No claim has been made that Michigan's three-year statute of limitations for § 1983 claims is too restrictive.

E. Not applying Michigan's tolling statute, MCL 600.5851(1), to prisoner § 1983 claims against prison personnel is neutal with regard to the objective of compensation embodied in 42 USC § 1983.

While applying Michigan's tolling statute would be inconsistent with the deterrent objective of § 1983, it is neutral in its effect on the compensation objective of the statute. A prisoner is not denied his opportunity for compensation if the tolling provision is

not applied, he is only required to bring his action within the three-year period provided by the statute of limitation, MCL 600.5805(8). As the Sixth Circuit pointed out in Higley:

> "Although the application of the tolling provision is not inconsistent with this policy, [compensation] the goal of compensation certainly does not require the application of the tolling statute based solely on incarceration." 835 F2d at 626.

Application of Michigan's tolling statute would be inconsistent with the deterrent objective of § 1983 and not applying the statute is neutral regarding the compensation objective. Michigan's tolling statute should, therefore, not be borrowed to allow a prisoner to file a § 1983 action against prison personnel on a claim which accrued while imprisoned beyond the three-year period provided in MCL 600.5805(8).

While the principal objectives of § 1983 are deterrence and compensation, there are other federal interests which must be considered in determining whether to borrow a state tolling statute. Included in those interests are uniformity, certainty, and minimization of unnecessary litigation. In Wilson, in support of its adopting the state statute of limitations relating to personal injury as applicable to § 1983 claims, the Court held:

> "The federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach." 471 US at 275.

Application of Michigan's tolling statute to § 1983 actions by a prisoner against prison personnel which accrue while the plaintiff is imprisoned does not advance these federal interests.

Regarding uniformity and certainty, it is recognized that perfect uniformity and absolute certainty in the area of statutes of limitations and the tolling provisions cannot be achieved unless there is federal legislation. A tolling statute to be borrowed must not, however, create disparate treatment of similar claims based on geography. To allow a prisoner's § 1983 claim to be barred in one state in a specific maximum number of years as in South Dakota, (see Hughes v Sheriff of Falls River County Jail, 814 F2d 532 (CA 8, 1987)), and to allow the same claim to remain viable for decades, as in Michigan, does not advance the cause of uniformity or certainty.

Even within Michigan if the tolling statute is applied, the same § 1983

prisoner claim would be subject to a different time period for filing depending on the length of the prisoner's sentence. If two prisoners are involved in the same improper conduct by prison personnel, on the day of imprisonment, one serving a five-year sentence and the other a 40-year sentence, the first prisoner would be required to file his action in six years, the second prisoner in 41 years. Such a disparity does not promote uniformity nor certainty in § 1983 actions.

To promote uniformity and certainty, a fixed period of time needs to be readily ascertainable from the statutes by a plaintiff. Michigan's tolling statute does not provide the necessary elements to be consistent with the

federal interests of uniformity and certainty.

The federal interest in reducing unnecessary litigation is also not served by Michigan's tolling statute in § 1983 prisoner claims. If Michigan's tolling statute is applied to § 1983 claims by a prisoner, it could remain viable for decades. During this period the conduct which resulted in the claim could continue resulting in the accrual of more claims. Many of these new claims would have been avoided if the prisoner had not been allowed to wait to file his claim. If a claim is filed within the three-year period provided by Michigan's statute of limitation, years of potential litigation are avoided.

The advancement of federalism should be considered. Tomanio, supra, which

found in a non-prisoner § 1983 action that New York's tolling statute applied, stated:

> "Considerations of federalism are quite appropriate in adjudicating federal suits based on 42 USC § 1983." 446 US at 492.

Federalism should not, however, be the determining factor in whether a state statute is consistent with the purposes of § 1983. As stated in Johnson v Railway Express Agency, 421 US 454, 465 (1975):

> "...considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration."

Since Michigan's tolling statute is inconsistent with one of the principal objectives of § 1983, deterrence, the interest of federalism is subjugated to the principal objective.

To allow the goal to advance federalism to override the principal objectives of § 1983 would, in effect, render § 1983 ineffective in carrying out Congress' purpose. If federalism would have controlled the decision in Felder, the Wisconsin notice of claim statute would have been upheld. The effect would have been to unduly restrict a § 1983 claimant, and as a result, undermine the objectives of Congress in enacting § 1983.

II

PRISONERS HAVE READY ACCESS TO THE FEDERAL COURTS FOR § 1983 ACTIONS.

Petitioner argues that the Michigan tolling statute should be applied to prisoner § 1983 actions to allow the prisoners ready access to the courts. (Petitioner's brief, pp 9-11). Petitioner cites two District Court cases, Knop v Johnson, 667 F Supp 467 (WD Mich, 1987) and Hadix v Johnson, 694 F Supp 259 (ED Mich, 1988), to support his claim that prisoners do not have adequate access to the courts.

Although no question of access to the courts was raised by Petitioner in the District Court or the Court of Appeals, it should be noted that this Court in Bounds v Smith, 430 US 817 (1977), required:

> "...prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 US at 828.

Additionally, the Court in Johnson v Avery found that a state may not prohibit inmates from providing assistance to other inmates in filing legal actions. Access is a separate constitutional issue from the issue of whether application of Michigan's tolling staute to a prisoner's § 1983 claim is inconsistent with the objectives of the statute and one that has already been addressed by this Court.

Bailey v Faulkner, 765 F2d 102 (CA 7, 1985), which found that Indiana's tolling statute must be applied, recognized that prisoners were no longer disabled from filing § 1983 suits. In discussing

Indiana's tolling provision, the Court stated:

> "This provision, hopelessly archaic in an era when the ready access of prisoners to the courts, state and federal, is constitutionally guaranteed by cases such as Bounds v Smith (citation omitted) was repealed that year." 765 F2d at 103.

The Court should be aware of two things regarding access of prisoners in Michigan to the courts for purposes of § 1983. First, that prisoners may obtain a § 1983 claim form to file an action which is provided by the Michigan Department of Corrections to the inmates. J. App. p 2. The prisoner is advised on the form that if help is needed in completing the form, a Correctional Ombudsman is provided to the inmate to help. J. App. p 10. Secondly, the Court should be aware that both Hadix, supra, and Knop, supra, are presently on appeal

to the Sixth Circut Court of Appeals, Knop v Johnson, Sixth Circuit Docket Nos. 88-1563/1634 and Hadix v Johnson, Sixth Circuit Docket No. 88-1879, challenging the findings of lack of access to the courts.

The issue of access has been addressed by the Sixth Circuit in Higley. The court recognized that prisoners did indeed have access to the courts for § 1983 actions:

> "We are accutely aware of the multitude of cases filed by other Michigan prisoners seeking § 1983 relief in federal courts.[1] The plethora of § 1983 cases filed indicates very clearly the accessibility of federal courts to prisoners such as Higley.
>
> "1. For example, more than 150 civil rights cases by Michigan prison inmates were filed during the last six months of 1985 in the Eastern District of Michigan, and some 375 such cases in that period were filed altogether in Michigan federal district courts. Thirty-nine new appeals from these cases were filed

> in the Sixth Circuit during the period July 1985 through December 1985." 835 F2d at 626.

The Eleventh Circuit in Whitson v Baker, 755 F2d 1406, 1408 (CA 11, 1985), also acknowledged that prisoners had adequate access to the courts when it found that Alabama had 800 § 1983 actions filed against it each year. Access is not the issue, nor does it appear to be a real problem in § 1983 claims.

III

THE VARIOUS CIRCUIT COURTS OF APPEAL HAVE NOT ANALYZED TOLLING STATUTES WHEN APPLIED TO 1983 ACTIONS FILED BY PRISONERS TO DETERMINE IF THEY ARE INCONSISTENT WITH THE OBJECTIVES EMBODIED IN 42 USC § 1983.

This Court in Board of Regents v Tomanio, 446 US 478, 484-485 (1980), found that state statutes of limitations and the coordinate tolling statutes

should be adopted by federal courts in § 1983 actions, except when inconsistent with the federal policies embodied in 1983. The Sixth Circuit Court of Appeals in Higley analyzed Michigan's tolling statute, MCL 600.5801(1), using the criteria set forth in Tomanio, found that application of Michigan's tolling provision to prisoner § 1983 claims filed against prison personnel which accrued while imprisoned would be inconsistent with the objectives of 42 USC § 1983. That cannot be said for most of the circuit courts of appeal whose decisions are relied upon and cited by Petitioner.

Many of the cases cited by Petitioner, including Ortiz v LaVallee, 442 F2d 912 (CA 2, 1971); Ney v State of California, 439 F2d 1285 (CA 9, 1971);

and Duncan v Nelson, 466 F2d 939 (CA 7, 1972), were decided prior to Tomanio and are therefore not helpful since they did not analyze whether application of the tolling statute would be inconsistent with the objectives of 42 USC § 1983. These cases took a literal approach to applying tolling statutes. In effect the circuit courts stopped short of applying the three-prong test contained in 42 USC § 1988. If there was a state statute which tolled the statute of limitations, it was mechanically applied to § 1983 actions filed by prisoners after looking at the legislative hsitory. The courts rarely considered in any depth what effect applying the tolling statute would have on the objectives of § 1983.

In Turner v Evans, 721 F2d 341 (CA 11, 1983), and Whitson v Baker, 755

F2d 1406 (CA 11, 1985), the Court accepted the Georgia and Alabama Supreme Courts' analyses of the applicability of the tolling statute. The Court in each case found that even though the reasons for the tolling statute had disappeared, it was still valid law and could only be repealed by the legislature. There was no mention of Tomanio, even though it had been decided over two years before Turner, supra, nor was there any analysis of whether the application of the provision to a § 1983 claim would be inconsistent with federal law.

In Brown v Bigger, 622 F2d 1025 (CA 10, 1980), and May v Enomoto, 633 F2d 164 (CA 9, 1980), which were decided just after the opinion in Tomanio was issued, the courts felt bound to apply the state

tolling provision in prisoner § 1983 actions. There was no analysis of whether application was consistent with federal laws, nor was there any mention of Tomanio.

The Fifth Circuit in Miller v Smith, 625 F2d 43 (CA 5, 1980), which reversed its prior finding that the tolling statutes did not apply (Miller v Smith, 615 F2d 1037 (CA 5, 1980)), only stated " ... that under the teachings of Tomanio the prisoner was entitled to the benefit of the Texas tolling statute according to its express terms."

The decision in Miller, as well as Stephan v Dowdle, 733 F2d 642 (CA 9, 1984) and Bailey v Faulkner, supra, acknowledged that Tomanio controlled whether a tolling statute applied to

prisoner § 1983 actions, but there was no analysis as to whether the tolling statutes were inconsistent with policies embodied in § 1983. It appears that the court simply applied the literal language of the tolling statutes as interpreted by the state courts without regard for their impact on federal policy.

In one case, however, a Court of Appeals did analyze the effect of a tolling statute on prisoner § 1983 actions. In Hughes v Sheriff of Falls River County Jail, 814 F2d 532 (CA 8, 1987), the South Dakota statute under review limited the tolling period to a maximum of five years. The court found that this tolling provision was consistent with the objectives of § 1983 in that among other things it did not

interfere with either the compensation or deterrent objectives of § 1983.

The statute reviewed by the Eighth Circuit is unlike Michigan's open-ended tolling provision which has no fixed maximum tolling period. A prisoner in Michigan could, if the tolling statute is applied in § 1983 prisoner actions, file within one year of his release from prison whether it is 15, 20, 30 years or longer from the date that the action accrues. The Eighth Circuit, in commenting on Michigan's tolling statute, strongly implied that if the South Dakota statute were like Michigan's, it might have found it inconsistent with § 1983. The court stated:

> "The tolling provisions in Hawthorne [Hawthorne v Wells, 761 F2d 1514 (CA 11, 1985)] and Campbell [Campbell v Guy, 520 F Supp 53 (ED Mich, 1981) aff'd 711 F2d 1055 (CA 6, 1983), cert den 464 U.S. 105 (1984)] would have

> tolled the statute of limitations for the entire duration of the prisoner's incarceration, a period that could be measured in decades. The courts concluded that, at least where prisoners were not actually disabled from bringing lawsuits, tolling statutes that permit claims to lie dormant for such long periods are inconsistent with federal policies of repose [citations omitted] and with policies of deterrence underlying federal civil rights laws. [Citations omitted]. The South Dakota tolling provision, however, avoids this problem by limiting the total tolling period to a maximum of five years; thus, a § 1983 claim would in any case have to be brought within eight years of accrual, and this period is not so long as to render the provision inconsistent with the federal policies of repose." 814 F2d at 535.

Thus, while many circuits have encountered issues relating to tolling statutes in § 1983 prisoner actions, the decisions were either pre-Tomanio or they failed to analyze whether the application of the tolling provision in prisoner § 1983 actions would be inconsistent with

the objectives of the federal statute. In Higley and Hughes, the two decisions which have comprehensively analyzed tolling provisions in terms of Tomanio, it has been held or strongly implied that an open-ended tolling statute like Michigan's is inconsistent with the policies underlying § 1983 when applied to prisoner actions against prison personnel which accrued during imprisonment.

RELIEF

For the reasons set forth Respondent Dennis Straub requests that the decision of the Sixth Circuit Court of Appeals be affirmed.

Respectfully submitted,

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IN THE

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ARGUMENT

I. INTRODUCTION

This Court has repeatedly used a three-step test to determine the statute of limitations applicable to a claim filed under 42 USC § 1983:

> First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil rights statutes] into effect . . . ." If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum state. Ibid. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States." Ibid. *Burnett* v. *Grattan*, 468 U.S. 42 (1984).

Wilson v. *Garcia*, 471 US 261, 271 (1985). Under 42 USC § 1988, courts are directed to apply state limitations rules unless those rules conflict with the federal policies embodied in 42 USC § 1983. The state limitations rules "borrowed" for application to § 1983 actions "logically include[] rules of tolling" since "any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action." *Board of Regents* v. *Tomanio*, 446 US 478, 485 (1980), quoting *Johnson* v. *Railway Express Agency, Inc.*, 421 US 454, 463 (1976). Accord, *Chardon* v. *Fumero Soto*, 462 US 650 (1983).

The issue in this case is whether the Michigan disability tolling statute, M.C.L. 600.5851(1), is inconsistent with the federal policies embodied in 42 USC § 1983 such that federal courts must reject the application of the state statute to § 1983 actions.[1]

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[1] There is no dispute that Michigan courts would apply the tolling

II. RESPONDENT FAILS TO IDENTIFY ANY CONFLICT BETWEEN M.C.L. 600.5851 AND THE PARAMOUNT GOALS OF § 1983.

This Court has clearly stated that the paramount policies behind § 1983 are two: to compensate those wronged, and to deter the wrongdoers. See *Robertson* v. *Wegmann*, 436 US 584 (1978). Therefore, unless a state statute of limitations, with its coordinate tolling provisions, impairs either of these two policies, the state statute ought to control.

A. The Michigan Tolling Provision Fosters The Federal Interest Of Compensation.

Respondent does not argue that M.C.L. 600.5851 is inconsistent with "the central objective of the Reconstruction Era civil rights statutes . . . to ensure that those individuals whose federal . . . rights are abrograted may receive damages or injunctive relief." *Felder* v. *Casey*, 487 US ___, 108 S.Ct. 2302, 2307 (1988), quoting *Burnett, supra*, at 55. In fact, respondent describes the Michigan statute as "neutral with regard to the issue of compensation." See Respondent's Brief at pp. 20-21.

Given the compensatory purpose of the civil rights acts, *any* state statute of limitations will to some degree undercut the federal policy (of compensation). As noted in *Burnett* v. *Grattan:*

> The [civil rights acts] are characterized by broadly inclusive language. They do not limit who may bring

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statute in petitioner's favor on a state claim. *Higley* v. *Mich. Dept. of Corrections*, 835 F.2d 623, 625 (CA 6, 1987), citing *Hawkins* v. *Justin*, 109 Mich. App. 743 (1981). The *Higley* court notes that the Michigan legislature has reviewed the statute as recently as 1986. Id. See also Respondent's Brief at pp. 12-13.

> suit, do not limit the cause of action to a circumscribed set of facts, nor do they preclude money damages or injunctive relief. An appropriate limitations period must be responsive to these characteristics of litigation under the federal statutes. A state law is not "appropriate" if it fails to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts.

468 US at 50.

In one sense all statutes of limitations are inconsistent with § 1983 because the state and federal laws work at cross-purposes. The policies that underlie statutes of limitations further the *state* goal of repose—the notion that stale claims ought not to be brought with ease, or that unreasonable delay ought not to be rewarded. Since § 1983 is a broad remedial statute that creates a remedy for the most egregious kind of official misconduct, any state-imposed filing deadline will undermine the compensatory policy of the federal law to some degree. *Burnett, supra*, at 54-55. Contrary to what respondent argues, tolling provisions are not "neutral"—by creating exceptions to state filing deadlines, they *advance* the compensatory purpose of the federal law.

B. The Michigan Tolling Provision Fosters The Federal Interest Of Deterrence.

The heart of respondent's argument is that Michigan's tolling statute is "inconsistent with the deterrent objective" of § 1983. See Respondent's Brief at pp. 18-20. Surprisingly, respondent devotes fewer than three pages to this central issue.

Respondent, without additional discussion, relies on *Higley* v. *Michigan Department of Corrections*, 835 F.2d 623 (CA 6, 1987), and *Vargas* v. *Jago*, 636 F.Supp. 425 (SD

Ohio 1986) for the surprising proposition that shorter limitations periods are a stronger deterrent. With all due respect to the district court in *Vargas*, its analysis, which is the source of the respondent's argument, stands logic on its head.[2] It seems obvious to petitioner that the *longer* the statute of limitations the greater the deterrent value. Presumably state officials will be more hesitant to engage in conduct that violates others' civil rights if the victims have more time to sue, thus increasing the officials' exposure to liability. Indeed, the policy of deterrence would be served best if there were no period of limitations at all. See Petitioner's Brief at 21-25.[3]

Deterrence is mentioned most often in the criminal context, where prevention of anti-social behavior is a paramount goal. We impose stiffer penalties for more serious crimes as a deterrent.[4] Our criminal justice system also has lengthy limitations periods precisely so that persons who contemplate breaking the law, or suspects who flee

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[2] *Vargas* introduces the bizarre idea that a prisoner's filing of a § 1983 action serves a "rehabilitative" function in the prison setting, concluding that inmates should have to sue quickly in order to profit behaviorally from their victory. See 636 F.Supp. at 429. *Higley* borrows this muddled theory and applies it also to the *guards*, suggesting that correctional officers, like pets or infants, must be disciplined quickly (by the filing of a § 1983 action within three years?) in order to learn from their mistakes. See 835 F.2d at 626.

[3] Even on its own terms the respondent's analysis is misleading. In every case there is a greater deterrent value in a delayed yet successful suit (petitioner's position) than in an unsuccessful suit in which a serious civil rights violation goes unremedied (respondent's position). The appropriate comparison is not between the deterrent effects of promptly filed versus late filed claims (as *Higley* and respondent suggest) but between late filed claims where relief is granted versus late filed claims were relief is denied as time-barred.

[4] See generally, Andenaes, *Punishment and Deterrence* (1974).

prosecution, will have to fear prosecution (or will be subject to punishment) for the longest permissible time.[5] The Sixth Circuit's odd adherence to the opposite principle has been rejected by the other circuits for good reason, and *Higley* deserves to be overruled.

III. THE OTHER "FEDERAL INTERESTS" IDENTIFIED BY THE RESPONDENT ARE CONSISTENT WITH THE MICHIGAN DISABILITY TOLLING PROVISIONS.

In addition to discussing the purposes of § 1983—compensation and deterrence—respondent also looks at "other federal interests which must be considered in determining whether to borrow a state tolling statute." Respondent's Brief at pp. 22-27. These interests include "uniformity, certainty, minimization of unnecessary litigation, and federalism." Id. at 22.[6]

Despite what the respondent claims, these "interests" are not policies embodied in § 1983. They are judicial concerns which have been addressed by the Court in order to promote the primary purpose of § 1983, namely the enforcement of civil rights. In making these "other

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[5] In Michigan, for example, murder prosecutions are not subject to any limitation period. Kidnapping, assault with intent to murder, and extortion are subject to a ten year statute of limitations. The residual criminal statute of limitations in Michigan is six years. These limitations periods are tolled during any time that the party charged is not a resident of Michigan. See MCLA 767.24. Tolling provisions are also incorporated into the statute of limitations of the Modern Penal Code. See *Model Penal Code and Commentaries (Official Draft and Revised Comments)*, Part I, Article I, § 1.06 (American Law Institute 1985).

[6] Citing *Tomanio, supra*, at 492, respondent concedes that the policy of federalism would be advanced by a reversal in this case. See Respondent's Brief at pp. 25-26. Petitioner agrees, and therefore will not address that "interest" separately.

interests" arguments, respondent uses language from *Wilson* v. *Garcia*, *supra*, but substitutes a new meaning for each of the Court's terms.

A. Interstate And Intrastate "Uniformity And Certainty" Are Not Impaired By Tolling.

Respondent first argues that "uniformity and certainty" demand that claims may not be "barred in one state . . . and allow[ed] . . . to remain viable in other states." Respondent's Brief at 23. The fact that different states apply different statutes of limitations to identical claims has been settled law for decades. *O'Sullivan* v. *Felix*, 233 US 318 (1914). In *Robertson* v. *Wegmann*, 436 US 584, 589 (1978), this Court said that § 1988 "obviously means that there will not be nationwide uniformity" of limitations periods.

The *inter*state uniformity urged by the respondent could only be achieved by an amendment to § 1988. See *Note: A Statute of Limitations for 42 USC § 1983: More Than "Half a Measure of Uniformity"*, 73 U. Minn. L. Rev. 85 (October, 1988). Absent such an amendment to the federal law, the theory of federalism, the practicalities of concurrent jurisdiction, and the doctrine of *Erie* v. *Tompkins*, 304 US 64 (1938), all suggest that a healthy interstate *diversity* of procedure—and not uniformity—promotes federal interests.

Respondent next argues that uniformity and certainty demand that claims accruing at the same time in the same state not "be subject to a different time period for filing depending on the length of the [disability]." Respondent's Brief at 24. This argument ignores the whole purpose of a disability tolling statute. In passing the tolling statute the Michigan legislature *intended* to extend the limitations period for certain claimants. See *Hawkins* v. *Justin*,

supra, at 747-8. In *Chardon* v. *Fumero Soto*, *supra*, at 657, this Court explicitly rejected "the argument that the federal interest in uniformity justifie[s] displacement of state tolling rules."

Even without tolling provisions, statutes of limitations do not lead to perfect *intra*state uniformity or certainty because the bar of the statute of limitations is not absolute. At common law, as adopted by most states' rules of procedure, the statute of limitations is an affirmative defense that must be raised by the defendant. Ordinarily failure to raise the defense *in the first responsive pleading* constitutes a waiver of the defense. See e.g., Michigan Court Rule 2.116(C)(7) and (D)(2). In some situations the statute of limitations can be changed by the parties' own conduct, extending a claim long after the original cause of action arose, or reviving the claim even after it would have been barred. For example, fraudulent concealment can toll the statute indefinitely, and in contract actions partial payment can re-acknowledge the debt and renew the period of limitations. See M.C.L. 600.5855 and 5866.

As long as state procedural laws are borrowed by the federal courts there will be some inconsistencies in the filing deadlines for civil rights actions among the fifty states. As long as states' statutes of limitation contain tolling provisions there will also be some inconsistencies in the filing deadlines for civil rights actions within a state. Neither of these deeply rooted practices is contrary to the federal policies of compensation and deterrence embodied in 42 USC § 1983.

B. "Uniformity And Certainty" Do Not Require A Fixed Period Of Time.

Next respondent argues that "uniformity and certainty" demand that "a fixed period of time needs to be

readily ascertainable by [the parties]." See Respondent's Brief at 24. When the *Wilson* v. *Garcia* Court used the term "certainty" it referred to "certainty of the applicable statute of limitations," and not to "a fixed period of time." 471 US at 275. Until *Wilson*, the lower courts had themselves been uncertain which of several state statutes of limitations should apply to § 1983 actions. As a result, the issue (of which statute to apply) was being litigated in almost every case:

> . . . the legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by *uncertainty in the applicable statute of limitations*, for scarce resources must be dissipated by useless litigation on collateral matters.

Id. at 275 (emphasis added). In *Wilson* the Court sought to end this "conflict, confusion and uncertainty," *id.* at 266, by directing the courts to borrow and to apply to *all* § 1983 claims the one most analogous state statute of limitations.

Wilson did not completely solve the problem, however, and so just this term the Court heard and decided *Owens* v. *Okure*, ___ US ___, 57 U.S.L.W. 4065 (January 10, 1989). *Owens* ruled that every state's "one general or residual statute of limitations governing personal injury actions" will apply to § 1983 claims. Id. at 4068. As the unanimous *Owens* Court held:

> Potential § 1983 plaintiffs and defendants therefore can readily ascertain, with little risk of confusion or unpredictability, the applicable limitations period in advance of filing a § 1983 action.

Id. at 4069. No longer will litigants have to fight over which of several statutes of limitations governs, nor will case by case determinations (of the most appropriate statute) clog the courts. Whether or not a claim is timely

should usually be apparent as of the date of filing. In short, the problem of "certainty" raised by the respondent has already been resolved.

If the respondent's argument were to prevail, then the problem just resolved by *Owens* v. *Okure* would re-appear in a slightly altered form. Federal courts borrowing a state's residual statute of limitations, without the attendant tolling provisions, would have to devise a whole new series of rules about when and how tolling ought to be permitted, and a case by case determination would again be required for every "late" claim. By requiring that tolling provisions be borrowed as integral components of any state statute of limitations, certainty about the applicable law is achieved. See *Board of Regents* v. *Tomanio*, 446 US at 485-86, and *Chardon* v. *Fumero Soto*, 462 US at 657. See also Petitioner's Brief at 11-16.

Even using the term "certainty" in the way respondent uses it, the respondent's argument is still unconvincing. In fact the Michigan tolling statute does provide a measure of "certainty" for the litigants. It instructs the parties that one year from an objectively ascertainable date —the prisoner's date of release—the claim will be barred. While it may be true that all tolling reduces "certainty" in some psychological sense, that quality is not unique to the Michigan law. (All exceptions to rules create "uncertainty," usually in the interest of fairness.) Respondent fails to state how tolling of the statute of limitations runs counter to a *state* policy (when the state legislature itself enacted the tolling provision in the first place), or how it contravenes a *federal* policy (when the primary federal policies at issue are compensation and deterrence).

C. Tolling Does Not Create "Unnecessary Litigation."

Finally, respondent argues that tolling § 1983 actions is inconsistent with "the federal interest in reducing unnec-

essary litigation." Respondent's Brief at 25. When the term "unnecessary litigation" is used in respondent's brief, it refers to the merits of inmates' § 1983 actions. However, when the Court used those words in *Wilson* v. *Garcia*, 475 US at 275, it was not referring to substantive § 1983 claims, but to the "unproductive and ever increasing litigation" on the "collateral issue" of the "applicable statute of limitations." Ibid. By requiring that tolling provisions be borrowed as integral components of any state statute of limitations, this Court has sought to avoid "unnecessary litigation," and has consistently rejected what the respondent proposes here.

D. No U.S. Supreme Court Authority Supports The Respondent's Arguments.

This Court has addressed issues relating to limitations of § 1983 actions in several cases in recent years. In *Tomanio*, *supra*, and *Fumero Soto*, *supra*, the Court held that state tolling rules should be applied to § 1983 actions as those rules would be applied by state courts under state law. Respondent never attempts to explain why the Michigan disability tolling statute is different, for § 1983 purposes, from the New York statute applied by the Court in *Tomanio*.[7] Even more surprisingly, respondent's brief neither cites nor discusses *Fumero Soto*.

While respondent's arguments seem to have their genesis in *Wilson* v. *Garcia*, respondent's brief consistently redefines *Wilson's* terms, such that the logic of *Wilson* must be rejected if respondent's arguments are to prevail.

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[7] New York's tolling statutes are essentially identical to Michigan's. See *Tomanio*, *supra*, at 486, n. 6. The New York prisoners' tolling statute has previously been upheld as consistent with the purposes of § 1983. See *Ortiz* v. *LeVallee*, 442 F.2d 912 (CA 2, 1971), and *Kaiser* v. *Cahn*, 510 F.2d 282 (CA 2, 1974).

Respondent asks the Court to read into § 1983 a requirement of interstate and intrastate time uniformity, while *Wilson* and *Owens* only establish predictable rules for choice of limitations law.

In *Felder* v. *Casey*, 487 US ____, 108 S. Ct. 2302 (1988), and *Burnett* v. *Grattan*, 468 US 42 (1984), the Court refused to apply state laws which impeded ready access to the courts by civil rights claimants. In *Felder*, Wisconsin's notice of claim statute was found to be inconsistent with § 1983 since it would have severely restricted claimants' access to the courts. In *Felder* the Court said:

> Sound notions of public administration may support the prompt notice requirement, but those policies necessarily clash with the remedial purposes of the federal civil rights laws.

108 S. Ct. at 2310. In *Burnett* v. *Grattan*, *supra*, the Court held that Maryland's six month administrative statute of limitations should not govern § 1983 court actions. As Justice Rehnquist noted concurring in *Burnett*, before borrowing a state statute of limitations and applying it to § 1983 claims, a court must ensure that the state statute "afford[s] a reasonable time to the federal claimant." 468 US at 61. To date the Court has not rejected any state statute that made access to the courts easier for persons claiming to be victims of civil rights violations.

IV. RESPONDENT IGNORES THE LEGISLATIVE PURPOSE BEHIND TOLLING PROVISIONS.

In arguing that the Michigan tolling statute conflicts with federal civil rights policies, the respondent misstates the statute's scope, purpose, and effect.

A. The Michigan Tolling Statute Does Not Apply Solely To Prisoners.

In an attempt to "narrow" the issue before the Court, respondent discusses tolling only in the context of "a

§ 1983 claim of a prisoner against prison personnel which occurred while [the inmate] was imprisoned." Respondent's Brief at 13. Respondent fails to address the fact that the Michigan act tolls the statute of limitations not just for prisoners, but for *all* persons "under 18 years of age, insane, or imprisoned at the time the claim accrues." M.C.L. 600.5851(1). As the Michigan Court of Appeals recognized in *Hawkins* v. *Justin*, *supra*, at 747-48, the Michigan legislature intended that the extra protection afforded by the tolling provisions apply equally to all three classes of beneficiaries—minors, incompetents, and prisoners.

Nowhere does respondent suggest a logical distinction between tolling for prisoners and tolling for those with other disabilities. Minors and incompetents enjoy the benefits of the tolling provision even though virtually all of them have parents (or guardians appointed by the state) to look out for their interests.[8] These care-providing adults can file suit on behalf of their children or wards,[9] and they certainly have better practical access to the courts and to lawyers than state prisoners have.

Even free, sane, adults enjoy the benefit of tolling in some situations. If the defendant leaves the state, or if the injured party joins the armed forces, then the statute of

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[8] Respondent attacks the statute on the grounds that "the same § 1983 . . . claim would be subject to a different time period for filing depending on the length of the . . . sentence." Respondent's Brief at pp. 23-24. But that is true with all tolling statutes, and it is equally true for all classes of disabled litigants. Some minors will have eighteen years to sue, while others will have only a short time. For incompetents, the statute could be tolled forever or for a day.

[9] See e.g., Michigan Court Rule 2.420, and the Michigan Mental Health Code, M.C.L. 330.1600 et seq.

limitations is extended for the duration of these obstacles to the service of process or access to the courts.[10] It is hard to see why all of these state-imposed exceptions—every one of which *increases* access to the courts and *promotes* the federal policies of compensation and deterrence behind § 1983—should be discarded as inconsistent with federal law.

B. There Is No Factual Support For Respondent's Fact-Based Arguments.

Apart from the policy-based arguments refuted above, respondent makes two more fact-based arguments in support of the lower court's decision. First, relying on *dicta* in *Hughes* v. *Sheriff of Fall River County Jail*, 814 F.2d 532 (8th Cir. 1987),[11] respondent raises the spectre of endless litigation, saying that ". . . a prisoner's claim may lay dormant for decades . . . ." Respondent's Brief at 15.

Petitioner notes that neither the facts of this case nor the facts of any of the reported cases involving prisoner tolling statutes support this fear. For example, Mr. Hardin's claim was filed less than two years after the

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[10] See M.C.L. 600.5853, 5854.

[11] Petitioner's principal brief reviews in some detail recent Circuit Court decisions on prison tolling statutes and § 1983 claims, concluding that the Sixth Circuit stands virtually alone in rejecting state tolling statutes on the grounds that they are inconsistent with 42 USC § 1983. Petitioner's Brief at pp. 26-31.

Respondent's brief does not cite any additional authority. Instead, respondent seizes on the *Fall River dicta*, which suggests that the Eighth Circuit, while upholding a South Dakota statute, might not have upheld the Michigan statute. Respondent does not address or explain the rationale of the decisions which hold that tolling statutes are consistent with the policies of § 1983. See, e.g., *Bailey* v. *Faulkner*, 765 F.2d 102 (CA 7, 1985).

applicable statute of limitations would have run.[12] Assuming that an inmate were to file a claim "decades" late, to the prejudice of the defendant, the doctrine of laches, as well as the court's "discretionary power to locate a just result in light of the circumstances peculiar to the case," see *Occidental Life Ins. Co.* v. *E.E.O.C.*, 432 US 355, 373 (1977), should permit a court to dispose of such a case without imposing shocking or aberrant results.

Second, respondent resurrects the argument that prison inmates no longer are deprived of access to the courts, and that therefore there is no consuming justification for a prisoner tolling statute. That, of course, is a legislative decision, which the Michigan legislature has decided contrary to the wishes of the state Solicitor General.[13] The respondent's argument also ignores specific

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[12] Respondent does not argue that there are a significant number of tolled § 1983 claims, or that these claims contribute significantly to the docket control problems of the federal courts.

Attached as an Appendix a is a summary of a preliminary study of prisoners' § 1983 actions in the federal district court of the Eastern District of Michigan. Using random sampling, the study looked at 20 percent of all prisoners' actions closed between July 1, 1987, and June 30, 1988. In only 4.6 percent of the cases would the three-year Michigan residual statute of limitations have run but for the tolling provision at issue here.

Of those five files, two were dismissed as *habeas* challenges to the inmates' convictions, one was dismissed as a state tort claim (no action under color of state law), and one involved an ongoing claim for medical care such that the statute of limitations arguably had not run. Only *one case* (less than one percent of the total) was dismissed based on the bar of the statute of limitations.

[13] The Michigan legislature was presumably aware of the *better* access to the courts for minors and incompetents. It nevertheless chose to keep the package of disability tolling provisions intact. See *Hawkins* v. *Justin*, 109 Mich App. 743, 748 (1981).

findings to the contrary in recent decisions by the federal district courts of Michigan. See *Hadix* v. *Johnson*, 694 F.Supp. 259 (ED Mich. 1988), and *Knop* v. *Johnson*, 667 F.Supp. 467 (WD Mich. 1987), and the discussion in Petitioner's Brief at 9-11. Both decisions held that Michigan inmates do not have constitutionally required minimum access to the courts. But even if inmates enjoyed minimal *constitutional* access to the courts, the Michigan legislature has determined that prisoners and other disabled persons are deserving of extra time to perfect their claims, and *that* legislative determination ought to control.

Respondent also cites and relies on the Sixth Circuit case of *Higley* v. *Mich. Dept. of Corrections*, *supra*. Respondent's Brief at pp. 31-32. The *Higley* panel presumes that prison inmates have access to the courts simply because of the high volume of *cases* they file.[14] This inference is not justified. The raw statistics cited in *Higley*, 835 F.2d at 626, report only the number of *complaints* filed. The data tell us nothing about the inmates' ability to find competent counsel, to identify constitu-

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[14] One of the primary reasons for the outcome in *Higley* seems to have been the panel's concern with docket control:

> We are acutely aware of the multitude of cases filed by other Michigan prisoners seeking § 1983 relief in the federal courts. The plethora of § 1983 cases filed indicates very clearly the accessibility of federal courts to prisoners such as Higley.

835 F.2d at 626. While petitioner is sympathetic to the courts' problems with docket control, the *Higley* analysis is seriously flawed. Just because inmate Higley had filed at least two other previous lawsuits during his incarceration, and just because some inmates are virtual litigation machines, it does not follow that all 25,000 Michigan prisoners have meaningful access to the courts. See Appendix A.

tional issues, to draft legally sufficient pleadings, or to respond to motions by the defendants.[15]

In Michigan the form § 1983 complaint used by most prison inmates is printed by the Clerk of the Court and sometimes is furnished by the Department of Corrections. Once the complaint is filed, however, few inmates know how to proceed, and the vast majority of the cases go down on summary judgment. In most of *those* cases the inmate plaintiffs never file any other documents to support their claims or to respond to the defendants' motions for summary judgment or for dismissal.[16]

Petitioner submits that the *legislature's* concern, unlike the Sixth Circuit's, is with *meaningful* access to the courts and to lawyers, and not with docket control.

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[15] In the preliminary study of prisoners Section 1983 files described in the Appendix 'a', inmates were represented by counsel (at any stage of the proceedings) in only 7.4 percent of the cases. Of those eight files, counsel had withdrawn before the conclusion of the action in five of the cases.

[16] Looking at dispositions in the cases summarized in the Appendix 'a', 39.8 percent of the cases were dismissed pursuant to 28 USC § 1915(d), normally before service of process or the filing of an answer. Another 57.4 percent of the cases were decided on summary judgment or Federal Rules of Civil Procedure 12(b)(6) motions. The remaining 2.8 percent of the cases (three files) were dismissed by stipulation or voluntarily, which may or may not indicate settlements.

For more comprehensive studies of prisoners' *pro se* filings in civil rights cases, see T. Eisenberg and S. Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641 (1987); T. Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482 (1982); Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in Federal Courts*, 92 Harv. L. Rev. 610 (1979); and Bailey, *The Realities of Prisoners' Cases Under 42 USC § 1983: A Statistical Study in the Northern District of Illinois*, 6 Loy. U. Chi. L.J. 527 (1975).

The decision as to what constitutes meaningful access to the courts, and therefore the decision about for whom the statute of limitations tolls, is a legislative one that should not be pre-empted by the courts.

Finally, as a matter of legislative policy there is one special reason—unique to prison inmates—why a legislature might want to toll claims (that arise during incarceration) until after the plaintiff is released. Prisons are dangerous places, where felons who are sued by fellow inmates might be more able to retaliate with violence, thus bringing risk to the litigants, and making control of the prison population an even more difficult task than it already is. By allowing aggrieved persons to file suit up to one year after they are freed, the risk of violence between inmates is reduced, management of state facilities is made easier, and fairness is served.

The same rationale applies to and supports the federal purposes regarding § 1983 actions brought by inmates against prison guards acting under color of state law. Correctional staff exercise considerable power over inmates' lives, and it is not unknown for official defendants to harass or to retaliate against inmates who sue. The tolling provision prevents such abuses by allowing inmates to wait to file their claims until they are released from the system, where they are safely out of harm's way.

CONCLUSION

For all of the above reasons, petitioner requests that the decision of the Court of Appeals for the Sixth Circuit be reversed, and that this action be remanded to the district court for trial.

Respectfully submitted,

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APPENDIX A

Hardin Study

Prisoners' Civil Rights Cases Closed 7/1/87 0- 6/30/88
Eastern District of Michigan

The study data-base included all prisoners' civil rights cases closed in the Eastern District of Michigan during fiscal year 1987-1988. A request to the Administrative Office of the Federal Courts, in Washington, D.C., for that data-base produced a 79 page list of 585 files with the identifying code number 550 (prisoners' civil rights). The computer run included cases handled by the following judges:

Detroit		Flint/Bay City	
Surheinrich	45	Harvey	3
Cook	41	Newblatt	47
Demascio	46	Sub-total	50
Duggan	57		
Feikens	22		
Freeman	19	**Ann Arbor**	
Gilmore	54		
Hackett	35	Joiner	1
LaPlata	5	LaPlata	42
Pratt	17	Sub-total	43
Surheinrich	39		
Taylor	28		
Woods	46	**Other**	
Zatkoff	33		
Unidentified	2	Churchill	3
Sub-total	489	Sub-total	3

Total Cases in Data-base = 585

From the master list of 585 files, the date-base was reduced to a manageable number (147 files) by taking every fourth case to ensure random selection. However, the Flint/Bay City cases and the Ann Arbor cases have not been surveyed as of this

time, reducing the number of files by 24. In addition, at least 12 files were shells, the contents having been transferred to other districts within the state, to courts out of the state, to the Sixth Circuit on appeal, or to other files for consolidation. Recording and coding errors such as incorrect file numbers or non-prisoners' cases further reduced the survey sampling to 108 files.

The research was conducted by second and third-year law students on January 6 and 7, 1989. Researchers read every complaint and reviewed each file to record as much information as possible. (The form questionnaires used in the study are available from petitioner's counsel upon request). The information was then compiled by petitioner's counsel. A more detailed report of the survey results may be issued when all of the data are compiled.